TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1934

No. [redacted] 13.

DETROIT TRUST COMPANY, TRUSTEE,
PETITIONER,

vs.

STEAMER "THOMAS BARLUM", HER ENGINES,
ETC.; BARLUM STEAMSHIP COMPANY

No. [redacted] 14

DETROIT TRUST COMPANY, TRUSTEE,
PETITIONER,

vs.

STEAMER "JOHN J. BARLUM", HER ENGINES,
ETC.; BARLUM STEAMSHIP COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 26, 1934

CERTIORARI GRANTED APRIL 30, 1934

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 909

DETROIT TRUST COMPANY, TRUSTEE,
PETITIONER,

vs.

STEAMER "THOMAS BARLUM", HER ENGINES, ETC.; BARLUM STEAMSHIP COMPANY

No. 910

DETROIT TRUST COMPANY, TRUSTEE,
PETITIONER,

vs.

STEAMER "JOHN J. BARLUM", HER ENGINES, ETC.; BARLUM STEAMSHIP COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from district court of the United States, Western New York	1	1
Docket entries, suit No. 1794	1	1
Docket entries, suit No. 1795	4	2
Statement on appeal	7	3
Libel No. 1794	8	4
Exhibit A—Mortgage	17	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 17, 1934

—5000-C

	Original	Print
Exhibit B—Certificate of title	60a	38a
Exhibit C—Notice of acceleration	61	39
Libel No. 1795	62	39
Exhibit A—Mortgage	71	44
Exhibit B—Certificate of title	114a	72a
Exhiibt C—Notice of acceleration	115	73
Orders directing service, Recital as to	116	73
Claim of ownership, suit No. 1794	117	74
Claim of ownership, suit No. 1795	118	74
Amended exceptions of claimant, suit No. 1794	119	75
Opinion by Adler, D. J., re claimant's exceptions, suits Nos. 1794 and 1795	120	75
Order overruling claimant's exceptions in suit No. 1794.	122	77
Answer, suit No. 1794	124	78
Exceptions of libelant to answer, suit No. 1794	126	79
Opinion by Adler, D. J., re exceptions to answers in suits Nos. 1794 and 1795	128	80
Order re libelant's exceptions to answer, suit No. 1794..	129	81
Intervening libel of seamen, Recital as to	130	81
Statement of evidence	131	82
Caption	131	82
Testimony of Lawrence K. Butler	132	82
Ruth Alleman	166	108
John J. Barlum	199	135
Fred Van Zandt	216	149
Claimant's Exhibit No. 1—Letter from Detroit Trust Co. to J. J. Barlum, president, December 22, 1924	221	152
Claimant's Exhibit No. 3—Letter from Detroit Trust Co., January 28, 1927, to J. J. Barlum, president	223	153
Claimant's Exhibit No. 4—Statement of account proceeds of $75,000 mortgage on Thomas Barlum	226	155
Claimant's Exhibit No. 7—Letter, Detroit & Security Trust to J. J. Barlum, February 21, 1929	227	156
Claimant's Exhibit No. 8—Statement of proceeds of $200,000 mortgage on Thomas Barlum	231	158
Claimant's Exhibit No. 8-A—Authorization to distribute proceeds of Thomas Barlum mortgage	233	159
Recital as to Claimant's Exhibit No. 9	234	160
Claimant's Exhibit No. 13—Commitment of Detroit Trust, December 23, 1927, on $200,000 John J. Barlum mortgage	235	161
Recital as to Claimant's Exhibit No. 14	237	162
Claimant's Exhibit No. 15—Authorization to distribute proceeds of John J. Barlum mortgage	238	162
Claimant's Exhibit No. 15-A—Statement of Detroit Trust re proceeds of John J. Barlum mortgage	240	163
Libelant's Exhibit No. 16—Circular on $200,000 Thomas Barlum mortgage	241	164
Libelant's Exhibit No. 17—Circular on $200,000 John J. Barlum mortgage	243	165

	Original	Print
Recital as to Claimant's Exhibits 18 and 18-a to 18-f, inclusive	245	167
Claimant's Exhibit No. 19—Analysis of proceeds of $200,000 Thomas Barlum mortgage	246	167
Claimant's Exhibit No. 22—List of stockholders of Barlum Steamship Company	250	170
Libelant's Exhibit No. 23—Stockholders' consent to Thomas Barlum mortgage	251	171
Libelant's Exhibit No. 24—Resolution of Barlum Steamship Company as to mortgage on Steamer Thomas Barlum	253	173
Libelant's Exhibit No. 25—Stockholders' consent to John J. Barlum mortgage	255	174
Libelant's Exhibit No. 26—Resolution of Barlum Steamship Co. as to mortgage on Steamer John J. Barlum	258	176
Recital as to Libelant's Exhibits 27 and 28	261	178
Libelant's Exhibit No. 29—Certificate of ownership of Steamer John J. Barlum	261	178
Libelant's Exhibit No. 30—Certificate of ownership of Steamer Thomas Barlum	262	179
Opinion by Adler, D. J. (as to suits Nos. 1794 and 1795)	264	180
Final decree in suit No. 1794	268	182
Final decree in suit No. 1795	280	190
Findings and conclusions in suit No. 1794	294	199
Findings and conclusions in suit No. 1795	301	203
Notice of and order allowing appeal on suit No. 1794	308	207
Notice of and order allowing appeal in suit No. 1795	310	208
Assignments of error in suit No. 1794	312	208
Assignments of error in suit No. 1795	315	210
Stipulation extending time to file record	317	211
Stipulation as to contents and printing of record	318	212
Order directing filing of record	321	213
Clerk's certificate (omitted in printing)	322	213
Proceedings in United States circuit court of appeals, second circuit	323	
Opinion, Manton, J	324	215
Dissenting opinion, Hand, J	324	215
Decrees	328	221
Petition for rehearing (omitted in printing)	332	227
Orders denying petition for rehearing	336	
Clerk's certificate	348	229
Orders allowing certiorari	351	230
	352	231

[fols. a–1]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

Admiralty No. 1794

DETROIT TRUST COMPANY, Formerly Detroit & Security Trust Company, a Michigan Corporation, Trustee,

against

STEAMER THOMAS BARLUM, Her Engines, etc.

DOCKET ENTRIES

May 18, 1931. Filed libel.

May 18, 1931. Issued warrant of arrest and monition (Ret. 6/1/31).

May 18, 1931. Issued notices of seizure.

May 18, 1931. Filed order re service—Adler, J.

June 1, 1931. Filed appearance of Barlum SS. Co., notice and proof of service.

June 1, 1931. Filed claim of ownership of Barlum SS. Co., notice and proof of service.

July 6, 1931. Filed exceptions to libel (Barlum SS. Co.).

July 6, 1931. Filed exceptions to libel (Vacuum Oil Co.).

July 6, 1931. Filed stipulation re filing and arguing bill of exceptions.

July 14, 1931. Filed amended exceptions to libel.

[fol. 2] Oct. 23, 1931. Filed intervening petition of Great Lakes Towing Company.

Feb. 19, 1932. Filed opinion, Adler, J.

Feb. 23, 1932. Filed order overruling exceptions. Adler, J.

March 3, 1932. Filed answer of Barlum SS. Co.

March 8, 1932. Filed exceptions to answer and notice of argument.

May 28, 1932. Filed opinion. Adler, J.

June 7, 1932. Filed order re exceptions to answer. Adler, J.

June 18, 1932. Filed intervening libel of Superior Shipbuilding Co.

June 18, 1932. Filed intervening libel of Buffalo Dry Dock Co.

June 16, 1932. Filed note of issue—July, 1932, term.
July 12, 1932. Filed depositions of Ruth Alleman et al.
July 14, 1932. Trial before J. Adler at Buffalo (tried with 1795).
March 10, 1933. Filed opinion. Adler, J.
April 6, 1933. Filed proposed findings of fact.
April 6, 1933. Filed findings of fact and conclusions of law.
April 13, 1933. Filed bill of costs and notice of taxation.
April 13, 1933. Filed petition.
April 13, 1933. Filed decree of foreclosure of preferred mortgage and order of sale. Adler, J.
(Judg. $229,846.65 for libel.)
[fol. 3] July 10, 1933. Filed notice of appeal and order allowing appeal. Knight, J.
July 10, 193. Filed assignment of errors.
July 17, 1933. Filed appeal bond.

[fol. 4] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

In Admiralty No. 1795

DETROIT TRUST CO., Formerly Detroit & Security Trust Co., a Michigan Corporation, Trustee,

against

STEAMER JOHN J. BARLUM, Her Engines, etc.

DOCKET ENTRIES

May 18, 1931. Filed libel.
May 18, 1931. Issued warrant of arrest and monition (Ret. 6/1/31).
May 18, 1931. Issued notices of service.
May 18, 1931. Filed order re service. Adler, J.
June 1, 1931. Filed appearance Barlum SS. Co., notice and proof of service.
June 1, 1931. Filed claim of ownership of Barlum SS. Co.
July 6, 1931. Filed exceptions to libel (Barlum SS. Co.).
July 6, 1931. Filed exceptions to libel (Vacuum Oil Co.).

July 6, 1931. Filed stipulation re filing and arguing bill of exceptions.

July 13, 1931. Filed amended exceptions to libel.

Feb. 19, 1932. Filed opinion. Adler, J. (filed in 1794).

[fol. 5] Feb. 23, 1932. Filed order overruling exceptions. Adler, J.

March 3, 1932. Filed answer of Barlum SS. Co.

March 8, 1932. Filed exceptions to answer and notice of argument.

March 8, 1932. Filed petition for leave to intervene.

March 8, 1932. Filed order granting petition for leave to appeal.

March 8, 1932. Filed intervening libel of Wm. W. Parry.

May 28, 1932. Filed opinion. Adler, J. (filed in 1794).

June 7, 1932. Filed order re exceptions to answer. Adler, J.

June 18, 1932. Filed intervening libel of Buffalo Dry Dock Co.

June 16, 1932. Filed note of issue—July, 1932 term.

July 2, 1932. Filed depositions of Ruth Alleman et al.

July 14, 1932. Trial before J. Adler at Buffalo (tried with 1794).

March 10, 1933. Filed opinion. Adler, J. (filed in 1794).

April 6, 1933. Filed proposed findings of fact.

April 6, 1933. Filed findings of fact and conclusions of law.

April 13, 1933. Filed bill of costs and notice of taxation of int. lib.

April 13, 1933. Filed bill of costs and notice of taxation of lib.

April 13, 1933. Filed petition.

[fol. 6] April 13, 1933. Filed decree of foreclosure of preferred mortgage and order of sale. Adler, J.

($235,415.66 for lib. and $2,891.91 for int. lib.)

July 10, 1933. Filed notice of appeal and order allowing appeal. Knight, J.

July 10, 1933. Filed assignment of errors.

July 17, 1933. Filed appeal bond.

[fol. 7] IN UNITED STATES DISTRICT COURT

STATEMENT ON APPEAL

Suit No. 1794 against the Steamer Thomas Barlum was commenced on May 18, 1931, by the filing of the libel; the

original parties are as shown in the title and no change has taken place therein. The pleadings other than the libel were filed as follows: Claimant's exceptions to libel, on July 6, 1931; exceptions of intervener Vacuum Oil Company, same date; claimant's amended exceptions to libel, July 13, 1931; intervening petition of Great Lakes Towing Company, October 23, 1931; answer of claimant, March 3, 1932; libelant's exceptions to answer, March 8, 1932; intervening libels of Buffalo Dry Dock Company and Superior Shipbuilding Company, June 18, 1932. The steamer was seized by the Marshal under process in the suit, on May 18, 1931; no bail, stipulation or release bond has been given. The trial was had on July 14, 1932, before Hon. Simon L. Adler, District Judge; no question was referred to a commissioner. The final decree of foreclosure was entered on April 13, 1933, and the appeal was taken on July 10, 1933.

All of the above is likewise true as to the suit against the Steamer John J. Barlum, except that in the Steamer John J. Barlum case no petition or libel was filed by Great Lakes Towing Company or Superior Shipbuilding Company, but an intervening libel for wages was filed, on March 8, 1932, by William W. Parry and others.

[fol. 8] IN UNITED STATES DISTRICT COURT

LIBEL—No. 1794

To the Honorable Judges of the United States District Court for the Western District of New York:

The Libel of Detroit Trust Company (formerly Detroit and Security Trust Company), a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, as trustee, against the Steamer Thomas Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances, and against all persons having or claiming any interest therein, in a cause civil and maritime, of foreclosure of a preferred mortgage, alleges on information and belief and respectfully shows unto this honorable court as follows:

First: Libelant at all times hereinafter mentioned was and now is a corporation duly organized and existing under

and by virtue of the laws of the State of Michigan, and having its principal office and place of business in the City of Detroit, in the said State of Michigan; that on or about November 6, 1930, libelant changed its corporate name [fol. 9] from Detroit and Security Trust Company to Detroit Trust Company by duly amending its Articles of Association to that effect.

Second: That the said Steamer Thomas Barlum is, and at all times mentioned in this libel was, a vessel of the United States of the burden of 20 tons and upwards, to-wit, 5752 tons gross, and 4485 tons net register, duly enrolled for the coasting trade of the United States and the Great Lakes and their connecting and tributary waters, and is now within the Western District of New York, to-wit, at the port of Buffalo and within the jurisdiction of this Honorable Court.

Third: That on or about March 1, 1929, the Barlum Steamship Company, a West Virginia corporation, having an office in the City of Detroit in the State of Michigan, was the sole owner of the whole of the said Steamer Thomas Barlum, and the said Barlum Steamship Company being justly indebted to libelant herein in the sum of two hundred thousand dollars ($200,000.00) evidenced by its certain bonds in the aggregate principal sum of $200,000.00 maturing serially as hereinafter more particularly described, and for the purpose of securing the payment of the said indebtedness and interest thereon as evidenced by said bonds and the coupons attached thereto, and with the intention of granting libelant a preferred mortgage on the said Steamer Thomas Barlum, did execute and deliver such preferred mortgage on the whole of the said Steamer [fol. 10] Thomas Barlum on or about March 22, 1929. A true copy of said preferred mortgage is attached hereto, made a part hereof and marked "Exhibit A," and libelant begs leave to refer thereto for all the terms and conditions and provisions therein contained as though the same were herein fully and at large set forth.

Fourth: Said preferred mortgage was duly filed for record in the office of the Collector of Customs at Detroit, Michigan, the home port of said vessel, and was duly recorded in said office of the Collector of Customs in Book V of Mortgages, page 66, at 12:49 o'clock P. M. on March 25,

1929, which said record shows the name of the vessel, the names of the parties to the mortgage, the time and date of the reception of the mortgage, the interest in the vessel mortgaged and the amount and date of maturity of the mortgage in accordance with Section 30, Subsection (c) of the Merchant Marine Act of Congress of June 5, 1920, known as the "Ship Mortgage Act, 1920." An abstract and certificate of record of title of said vessel, dated February 16, 1931, duly certified under the seal of the Collector of Customs for the Port of Detroit by F. J. Heffner, Acting Deputy Collector of Customs of the Port of Detroit, Michigan, is attached hereto, made a part hereof, and marked "Exhibit B."

Fifth: That said preferred mortgage was endorsed upon the Marine Document of said Steamer Thomas Barlum in accordance with the provisions of said Ship Mortgage Act [fol. 11] 1920. That an affidavit was filed with the record of said mortgage to the effect that the mortgage was made in good faith and without any design to hinder, delay or defraud any existing or future creditors of the mortgagor or any lienor of the mortgaged vessel, a true copy of which affidavit is attached to the copy of the mortgage which is annexed hereto as Exhibit A. That said mortgagee, Detroit and Security Trust Company (now Detroit Trust Company) as Trustee, by A. W. Massnick, its Assistant Secretary, made affidavit which was filed with the record of said mortgage, to the effect that the said Detroit and Security Trust Company was then a citizen of the United States within the meaning of Section 2 of the Shipping Act of 1916, as amended by the Merchant Marine Act of June 5, 1920, that said mortgagee still is a citizen of the United States within the meaning of said Acts, that the said preferred mortgage did not stipulate that the mortgagee waived the preferred status thereof, that all of the acts and things required to be done by the said Merchant Marine Act of June 5, 1920, in order to give the said mortgage the status of a preferred mortgage were duly done or caused to be done either by libelant or by the Collector of Customs of the Port of Detroit.

Sixth: That the Collector of Customs for the Port of Detroit, Michigan, upon the recording of said preferred mortgage, delivered two certified copies thereof to the

mortgagor, the said Barlum Steamship Company, which through its officers or agents placed and used due diligence [fol. 12] to retain one copy on board the Steamer Thomas Barlum and caused the said copy and the documents of the said vessel to be exhibited by the master to any person having business with the vessel which might give rise to a maritime lien upon the said vessel, or to the sale, conveyance or mortgage thereof, and at all times since then the master of said vessel, upon the request of any such person has exhibited to him the documents of said vessel and the copy of said preferred mortgage placed on board thereof.

Seventh: That said preferred mortgage stated the interest of the mortgagor in the Steamer Thomas Barlum and the interest conveyed or mortgaged, and before the same was recorded said mortgage had been duly acknowledged according to law.

Eighth: On the 1st day of February, 1931, bonds Nos. 1 to 25, inclusive, aggregating twenty-five thousand dollars ($25,000.00) in principal amount, fell due and were duly presented for payment at the office of Detroit Trust Company (formerly Detroit and Security Trust Company) in Detroit, Michigan, and demand for payment thereof made, but the said Barlum Steamship Company refused and neglected and ever since has refused and neglected to pay the principal amount of said bonds so maturing, or any part thereof.

Ninth: Article XV of said preferred mortgage provides in part as follows:

[fol. 13] "* * * If default shall be made in the payment of any of the bonds or coupons aforesaid, principal or interest, or any part thereof—* * * and if such default shall continue for fifteen (15) days—* * * the trustee may declare all of the said bonds and coupons then outstanding immediately due and payable, anything therein to the contrary notwithstanding * * *."

Tenth: That pursuant to the provisions of said preferred mortgage and particularly to the provisions of Article XV thereof, libelant as mortgagee under said preferred mortgage has declared all of the said principal sum secured

thereby and the said outstanding bonds hereinabove referred to to be immediately due and payable; that a copy of the letter by which such declaration was made is annexed hereto and marked "Exhibit C"; that the original of said letter has been personally served on John J. Barlum, President of the Barlum Steamship Company, respondent herein and mortgagor under said preferred mortgage of March 1, 1929.

Wherefore, libelant prays:

I. That process in due form of law, according to the course and practices of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said Steamer Thomas Barlum, her engines, boilers, boats, etc., and that all persons having or claiming any interest therein may be cited to appear and answer all matters [fol. 14] aforesaid, and that the Steamer Thomas Barlum, her engines, boilers, boats, etc., may be condemned and sold to pay the demands and claims aforesaid with interest and costs, and to pay any and all other amounts required to be paid by the mortgagor to mortgagee under the said preferred mortgage with interest and costs, and that libelant may have such other and further relief as in law and justice it may be entitled to receive.

II. That the said preferred mortgage, dated the 1st day of March, 1929, executed and delivered by the Barlum Steamship Company to Detroit and Security Trust Company (now Detroit Trust Company) as Trustee, may be declared to be a valid and subsisting lien upon the said Steamer Thomas Barlum, her engines, boilers, boats, etc., in said preferred mortgage described and thereby conveyed and transferred prior and superior to the interests, liens or claims of any and all persons, firms or corporations whatsoever, except such persons, firms or corporations as may hold preferred maritime liens on the said vessel.

III. That in default of the payment of the sums found to be due and payable to your libelant under the said preferred mortgage within the time to be limited by a decree of this Honorable Court, together with a sum sufficient to pay the costs of this suit, it may be decreed that any and all persons, firms and corporations claiming any interest in the said steamer are forever barred and foreclosed of and

from all right or equity of redemption or claim of, in or to [fol. 15] the said Steamer Thomas Barlum, her engines, boilers, boats, etc., and every part thereof.

IV. That pending final disposition of said vessel this Honorable Court will appoint Detroit Trust Company, of Detroit, Michigan, or some other suitable person, receiver of said vessel with authority to operate the same subject to the further order of this court as provided by Section L of said Ship Mortgage Act 1920.

V. That this Honorable Court shall direct the manner in which actual notice of the commencement of this suit shall be given by the libelant to the master, other ranking officer or caretaker of the Steamer Thomas Barlum, and to any person, firm or corporation who has recorded a notice of claim or an undischarged lien upon the vessel as provided in Subsection (k) of Section 30 of said Ship Mortgage Act 1920.

Detroit Trust Company (formerly Detroit and Security Trust Company), Trustee, by (Sgd.) C. T. Darnton, Vice-President. Miller, Canfield, Paddock & Stone, 3456 Penobscot Building, Detroit, Michigan; Stanley & Gidley, Marine Trust Company Bldg., Buffalo, New York, Proctors for Libelant.

[fol. 16] *Duly sworn to by C. T. Darnton. Jurat omitted in printing.*

[fol. 17] EXHIBIT A TO LIBEL

Preferred Mortgage

Steamer "Thomas Barlum," Barlum Steamship Company, to Detroit and Security Trust Company

Index

	Pages
Parties	1
Resolutions	1
Bond	1- 6
Description	7
Assumpsit	8

Index—Continued

	Pages
Redemption	8- 9
Covenants and agreements	9
Article I. Authority to mortgage	9
Article II. Warranty of title	9
Article III. Insurance	9-11
Article IV. Use of vessel	11
Article V. Liens	11-12
Article VI. Notice of mortgage	12
Article VII. Release of attachments	12
Article VIII. Keep vessel repaired	12
Article IX. Inspection by trustee	13
Article X. Taxes, etc.	13
Article XI. Trustee may remedy defaults	13-14
Article XII. Possession	14
Article XIII. Preferred mortgage	14
Article XIV. Further assurances	14-15
Article XV. Remedies on default	15-16
[fol. 18] Article XVI. Receiver	16-17
Article XVII. Application of proceeds	17
Article XVIII. Discontinuance of proceedings	17-18
Article XIX. No waivers	18
Article XX. Discharge of mortgage	18
Article XXI. Successors and assigns	18
Article XXII. Certificate of enrollment and license	18-19
Article XXIII. Delivery of bonds and recognition of bondholders	19
Article XXIV. Conditions of acceptance of trust	19-21
Article XXV. Financial statements: Alienation	21
Signatures	21-22
Acknowledgments	22-25
Affidavit of good faith	25-26
Affidavit of consent of stockholders	26
Oath of secretary of Barlum Steamship Company	27-28
Oath of assistant secretary Detroit and Security Trust Company	29
Consolidated certificate of enrollment and license	30

This Mortgage, Made this first day of March, A. D. 1929, by and between Barlum Steamship Company, a corporation

organized under the laws of the State of West Virginia, party of the first part, (hereinafter called the Mortgagor), and Detroit and Security Trust Company, a Michigan corporation having its principal place of business in the City of Detroit, Michigan, as Trustee, for the uses and [fol. 19] poses hereinafter expressed, party of the second part, (hereinafter called the Trustee)—

Witnesseth

Whereas, the Mortgagor is the sole owner of the steam screw vessel called the "Thomas Barlum," of Detroit, official number 204798, of about 5,752 gross tons and 4,485 net tons register, hereinafter more particularly described, which said vessel is duly enrolled as a vessel of the United States in the office of the Collector of Customs at the Port of Detroit, her home port; and

Whereas, the Mortgagor, by resolutions of its stockholders and directors has duly authorized, made and delivered an issue of its first and preferred mortgage bonds to the amount of two hundred thousand dollars ($200,000.00) in substantially the following form, to-wit:

United States of America,
State of West Virginia:

Barlum Steamship Company

Six Per Cent First and Preferred Mortgage Gold Bond

No. —. $1,000.00

Know All Men By These Presents, that Barlum Steamship Company, a corporation organized under the laws of the State of West Virginia, for value received, acknowledges itself to owe and hereby promises to pay to the bearer, or, if registered, to the registered holder hereof, the sum of one thousand dollars ($1,000.00) at maturity of [fol. 20] this bond as hereinafter fixed, together with interest thereon from the first day of March, 1929, until so paid, at the rate of six per centum (6%) per annum, payable semi-annually, on the first days of August and February in each year, in accordance with the terms of, and upon presentation and surrender of, the coupons hereto attached, as they severally mature, both principal and interest being payable

at the office of Detroit and Security Trust Company, Detroit, Michigan, in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed on March 1, 1929.

Barlum Steamship Company will pay the principal and interest hereof without deduction for any tax, charge or assessment, and especially without deduction for the Federal Income Tax, not in excess of two per centum (2%), which is or may be required to be withheld under the present or any future income tax law of the United States on the coupons of this bond, Barlum Steamship Company hereby agreeing, so far as it legally may, to pay all such taxes, charges and assessments, including such Federal Income tax not in excess of two per centum (2%) on said coupons.

This bond is one of two hundred (200) bonds, numbered consecutively from one (1) to two hundred (200), both numbers inclusive, aggregating two hundred thousand dollars ($200,000.00) in principal amount, for the principal sum of one thousand dollars ($1,000.00) each, all bearing the same date, and maturing in five (5) annual series, as follows, to-wit:

[fol. 21] $25,000.00—Bonds Nos. 1- 25, inclusive, February 1, 1931
25,000.00—Bonds Nos. 26- 50, inclusive, February 1, 1932
25,000.00—Bonds Nos. 51- 75, inclusive, February 1, 1933
25,000.00—Bonds Nos. 76-100, inclusive, February 1, 1934
100,000.00—Bonds Nos. 101-200, inclusive February 1, 1935

issued by the said Barlum Steamship Company, and proportionately secured both as to principal and interest, without preference or priority of security of one bond over another, by a certain first and preferred mortgage bearing even date herewith, duly made and delivered by the said Barlum Steamship Company, to Detroit and Security Trust Company, of Detroit, Michigan, as Trustee, upon the Steamer "Thomas Barlum" which mortgage is recorded in the office of the Collector of Customs for the Port of Detroit, Michigan, and endorsed on said vessel's marine document as a preferred mortgage on said Steamer "Thomas Barlum," in accordance with the "Ship Mortgage Act 1920," to which mortgage reference is hereby made for a description of the mortgaged property, and the terms and conditions under which said bonds are secured.

It is expressly agreed and made a part hereof that this

bond, before its absolute date of maturity, may, at the option of the said Barlum Steamship Company, be redeemed and paid on any interest payment day, upon payment by said Barlum Steamship Company to the holder hereof, or to the Trustee for the benefit of the holder hereof, of the principal hereof and all interest due hereon at the date fixed for such redemption, together with a premium of one-half of one per centum (½ of 1%) of the principal, all upon the terms and conditions specified in said Mortgage; [fol. 22] such redemption and payment, if made, to be in the numerical order of the bonds then outstanding.

This bond shall pass by delivery, unless registered, but it may be registered as to the principal in the owner's name on the books of Detroit and Security Trust Company, at its office in Detroit, Michigan, such registry being noted hereon by said Trust Company, after which registration only such registered owner or the legal representative of such owner shall be entitled to receive the principal hereof, and no transfer shall be valid unless made on said Trust Company's books by the registered owner in person, or by the legal representative of such owner, and similarly noted hereon, but the same may be discharged from registry by transfer to bearer, after which it shall be transferable by delivery, but it may be registered again as above. Such registry shall not, however, affect the negotiability of the coupons, which shall always be transferable by delivery.

This bond shall not be valid or become obligatory for any purpose until the "Trustee's Certificate" endorsed hereon is executed by said Detroit and Security Trust Company, Trustee.

United States Revenue stamps in the amount of one hundred dollars ($100.00) have been affixed to the mortgage securing this bond and duly canceled.

In Witness Whereof, the said Barlum Steamship Company has caused this bond to be executed in its behalf by its President and Secretary, and its corporate seal to be hereunto affixed, and the coupons hereon to be authenti- [fol. 23] cated by the facsimile signature of its treasurer, this first day of March, A. D. 1929.

Barlum Steamship Company, by —— ——, President, and —— ——, Secretary. (Seal.)

(Form of Coupon No. 1)

No. 1. $25.00

On the first day of August, A. D. 1929, Barlum Steamship Company will pay to bearer $25.00 in United States gold coin at the office of Detroit and Security Trust Company, Detroit, Michigan, without deduction for any taxes, charges and/or assessments payable by it as set forth in said bond, being five months' interest due that day upon its six per cent First and Preferred Mortgage Gold Bond of March 1, 1929, No. —.

Barlum Steamship Company, by —— ——, Treasurer.

(Form of Coupons Other Than Coupon No. 1)

No. —. $30.00

On the first day of —, A. D. 19—, Barlum Steamship Company will pay to bearer $30.00 in United States Gold Coin at the office of Detroit and Security Trust Company, [fol. 24] Detroit, Michigan, without deduction for any taxes, charges and/or assessments payable by it as set forth in said bond, being six months' interest due that day upon its six per cent First and Preferred Mortgage Gold Bond of March 1, 1929, No. —.

Barlum Steamship Company, by —— ——, Treasurer.

(Trustee's Certificate)

This Is To Certify that this bond is one of an issue of bonds described in the mortgage within mentioned.

Detroit and Security Trust Company, Trustee, by —— ——, Assistant Vice-President; —— ——, Assistant Secretary; —— ——, Assistant Treasurer.

(Notice)

Nothing can be written on this bond except by an officer of Detroit and Security Trust Company as registrar, without impairing its negotiability.

Date	In whose name registered	Registrar
.....	.....	.....

(Form of Guaranty)

For Value Received, I, John J. Barlum, of Detroit, Michi-
[fol. 25] gan, do hereby guarantee payment of the within bonds and coupons, as and when the same shall become due, principal and interest, and of any extension thereof, in whole or in part, and I hereby waive presentment for payment, demand, protest and notice of protest and non-payment, and also agree that I shall in no respect be released from the obligation of this guaranty by any act or proceeding taken under any of the provisions of the mortgage mentioned in said bond, or by any extension of the time of payment thereof.

——— ———. (L. S.)

And Whereas, the Mortgagor, with the consent of more than two-thirds (2/3) of its stockholders in writing and by resolution of its board of directors duly adopted, has duly authorized and directed the execution and delivery of this first and preferred mortgage to the Trustee, for the purpose of fully securing the payment of said bonds and coupons and the performance of all the conditions and covenants herein contained,

Now, therefore, this mortgage witnesseth:

That in consideration of the premises and of the sum of one dollar ($1.00) to it duly paid by the Trustee, at or before the sealing and delivery of these presents, and for other valuable considerations, the receipt whereof is hereby acknowledged, and in order to secure the due and punctual payment of said bonds and coupons according to their tenor and effect, and the due performance of all the covenants, provisions, agreements and conditions thereof and of this mortgage, and to secure all the holders of said bonds and cou-
[fol. 26] pons equally and with like effect and without any priority or preference of any one bond over another, save as in said bonds provided, the said Mortgagor, in the due exercise of its corporate powers, has granted, bargained, sold, conveyed, transferred, hypothecated and mortgaged, and by these presents does hereby grant, bargain, sell, convey, transfer, hypothecate and mortgage, unto the said Trustee, its successors and assigns, Forever, all of the following described property, to-wit:

"That certain steam screw vessel called the 'Thomas Barlum,' of Detroit, official number 204798, of about 5752

gross tons and 4485 net tons register, which said vessel is more fully described in her consolidated certificate of enrollment and license, a true copy of which is hereto attached and made a part hereof, together with all her engines, boilers, machinery, masts, bowsprits, boats, anchors, cables, rigging, tackle, apparel, furniture, and all other appurtenances thereunto appertaining and belonging, and any and all additions, improvements, and replacements in or to the said vessel or any part or appurtenance or equipment thereof";

To Have and To Hold, all and singular the above granted property, together with the appurtenances, and every part thereof, unto the said trustee, its successors and assigns, forever;

Provided, However, and these presents are upon the con- [fol. 27] dition that if the Mortgagor, its successors or assigns, shall pay or cause to be paid to said trustee, its successors or assigns, the said principal sum of two hundred thousand dollars ($200,000.00), with interest thereon at the rate of six per centum (6%) per annum, payable semi-annually, according to the tenor and effect of the bonds and coupons aforesaid; and shall keep, perform and observe all and singular the covenants and promises in said bonds and coupons and in these presents expressed to be kept, performed, and observed by or on the part of the said Mortgagor, then this Mortgage and the estate and rights hereby granted shall cease, determine, and be void—otherwise to remain in full force and effect.

Assumpsit

And the said Mortgagor hereby promises and agrees to pay the principal amount aforesaid, and the interest thereon, according to the tenor and effect of the said bonds and coupons as therein stipulated, and to fulfil, perform and observe each and every one of the covenants, agreements, and conditions in this mortgage and in said bonds and coupons contained.

Redemption

(a) The Mortgagor, prior to the maturities of said bonds, shall have the right, at its option, on any interest date, to pay all, or any of said bonds, in their numerical order, at one

hundred and one-half cents (100½c) on the dollar of the principal thereof, together with interest accruing to such date of payment.

[fol. 28] (b) In case of such redemption of bonds hereinbefore provided, the Mortgagor will give the Trustee four (4) weeks' prior written notice stating the amount of bonds to be redeemed, and, at least ten (10) days prior to the redemption date, the Mortgagor shall also deposit with the Trustee sufficient funds to pay such bonds, and interest thereon to the next ensuing interest date, and the premium aforesaid; upon making such deposit, further interest shall cease as to the bonds to be redeemed; upon receipt of such written notice and deposit, the Trustee will give notice of such redemption to the holders of the bonds to be redeemed, by a single publication at least five (5) days prior to the date of payment in a daily newspaper of general circulation in Detroit, Michigan. All expenses of redemption shall be paid the Trustee by the Mortgagor before the Trustee shall be required to act hereunder. All bonds and coupons redeemed or paid shall be canceled by the Trustee and not reissued.

Covenants and Agreements

The Mortgagor, for itself, its successors and assigns, hereby further covenants and agrees to and with the Trustee, its successors and assigns, as follows:

Article I

Authority to Mortgage

That the Mortgagor is a corporation duly organized and existing under and by virtue of the laws of the State of [fol. 29] West Virginia and that it is duly authorized to do business in the State of Michigan; that it is duly authorized to mortgage the property conveyed hereunder; that all corporate action on its part, and all action on the part of its stockholders and directors for the making and delivery of the bonds and coupons herein mentioned, and the execution and delivery of this mortgage, have been duly and effectively taken; and that said bonds and coupons in the

hands of the holders thereof, are and shall be valid and enforceable obligations of the Mortgagor in accordance with their terms.

Article II

Warranty of Title

That the Mortgagor is the sole, true and bona fide owner of all the said steam screw vessel "Thomas Barlum," and that it will warrant and defend the title and possession thereto, and every part and appurtenance thereof, for the benefit of the Trustee, against the claims and demands of all persons whomsoever.

Article III

Insurance

(a) That the Mortgagor, at its own cost, so long as any amount hereby secured is unpaid, shall keep said vessel insured in an amount in dollars, lawful money of the United States, equal to her full insurable value but not in any case for less than one hundred and ten per centum (110%) of the amount hereby secured remaining unpaid;

[fol. 30] (b) Such insurance shall be placed with responsible underwriters, in good standing and satisfactory to the Trustee;

(c) The policy valuation in the hull policies shall not exceed the amount insured thereby, unless with the written consent of the Trustee; all policies shall be on forms current on the Great Lakes for vessels of like class and value, or on such other forms as the Trustee may approve, insuring against all perils of the sea, and including the "Four-Fourths Running Down Clause" and "Inchmaree Clause," and having a deductible average not exceeding five per centum (5%) of the insured value;

(d) Such insurance shall include hull or port risk insurance and may include such an amount of disbursements and "total loss only" insurance as the policies permit;

(e) Said vessel shall also be fully covered by Protection and Indemnity insurance, in policies, and by underwriters approved by the Trustee, such protection and indemnity insurance also to protect the Trustee against any liability which the Trustee may incur;

(f) When and while laid up, port risk insurance on said vessel, to like amount, and in lieu of the aforesaid hull insurance, may be taken out by the Mortgagor under the form of port risk policies current on the Great Lakes, approved by the Trustee, with underwriters as aforesaid;

(g) All insurance shall be taken in the name of the Mortgagor for account of whom it may concern. All losses shall be made payable to the Trustee, as its interest may appear; [fol. 31] and, in the event of total loss, the Trustee will consent that the underwriters pay direct to the Mortgagor the amount by which the insurance exceeds one hundred and ten per centum (110%) of the amount then due the Trustee, upon receipt of payment of such last named amount; in the event of partial loss, if the Mortgagor be not in default hereunder, the Trustee will consent that the underwriters pay direct for repairs, salvage, and other charges, or reimburse the Mortgagor therefor, on satisfactory assurance that such payments are, or will be, made; but, if the Mortgagor be in default hereunder, the Trustee shall be entitled to collect and receive such insurance direct and to apply the proceeds in the manner provided in Article XVII hereof. All policies, certificates, binders and cover note shall be promptly delivered to the Trustee.

(h) The Mortgagor will give notice in writing to the Trustee of the due date for the payment of all premiums for hull insurance carried on said vessel, ten (10) days prior to said due dates.

Article IV

Use of Vessel

That the mortgagor will not do or permit any act, or suffer any omission, whereby any insurance on said vessel shall or may be suspended, impaired, or defeated; and that it will cause said vessel to be used and navigated in all respects in accordance with law.

[fol. 32]

Article V

Liens

That neither the Mortgagor nor the Master of the said vessel shall have any right, power, or authority to create,

incur, or permit to be placed or imposed upon the property subject or to become subject to this mortgage, any liens whatsoever other than for crew's wages and salvage. The Mortgagor will carry a properly certified copy of this mortgage with the ship's papers and shall exhibit the same to any person having business with the said vessel which might give rise to any lien other than liens for crew's wages and salvage.

Article VI

Notice of Mortgage

That the Mortgagor will, in all respects, comply with the provisions of the "Ship Mortgage Act, 1920," so as to create and maintain this mortgage as a preferred mortgage upon said vessel, within the provisions of said Act and the laws of the United States, in such respect made and provided; and that the mortgagor will also, from time to time, give such notices and perform such acts as the Trustee may request, as reasonably calculated to continue and preserve such preferred status of this mortgage until it is fully paid and performed.

Article VII

Release of Attachments

That if a libel shall be filed against said vessel, or if the [fol. 33] vessel is otherwise levied against, or taken into custody, or sequestered, by virtue of any legal proceedings in any court, the Mortgagor shall, within fifteen (15) days thereafter, cause the said vessel to be released and the lien to be discharged.

Article VIII

Keep Vessel Repaired

That the Mortgagor, will, at all times, at its own cost and expense, keep and maintain the said vessel in good, seaworthy condition and repair, and, annually, as requested, furnish the Trustee with a certificate of the American Bureau of Shipping that her class has been maintained.

Article IX

Inspection by Trustee

That the Mortgagor shall afford the Trustee or its authorized representatives, at all times, full and complete

access to the said vessel, for the purpose of inspecting the same and her cargoes, equipment and papers.

Article X

Taxes, Etc.

That the Mortgagor will pay and discharge, when due and payable, all taxes, assessments, civic impositions, governmental charges, fines and penalties imposed on said vessel; that it will at all times do all things necessary to preserve the lien of this mortgage as a first and prior lien [fol. 34] upon said vessel until the full payment of all sums secured hereby; and that it will also pay the normal Federal Income Tax, not in excess of two per centum (2%) upon the interest of the bonds aforesaid.

Article XI

Trustee May Remedy Defaults

That if the Mortgagor shall make default in the performance of any of the covenants in this mortgage on its part to be performed, the Trustee may, in its discretion, do any act or make any expenditure necessary to remedy such default, including, without limitation of the foregoing, entry upon the said vessel to make repairs, and the Mortgagor shall promptly reimburse the Trustee, with interest at the rate of six per centum (6%) per annum, for any and all expenditures so made or incurred, and until the Mortgagor has so reimbursed the Trustee for such expenditures the amount thereof shall be added to the amount of the debt secured by this mortgage, and shall be secured by this mortgage in like manner and extent as if the amount and description thereof were written herein; but the Trustee, though privileged so to do, shall be under no obligation to the Mortgagor to make any such expenditures nor shall the making thereof relieve the Mortgagor of any default in that respect. The Mortgagor shall also reimburse the Trustee promptly, with interest at the rate of six per centum (6%) per annum for any and all advances and expenses made or [fol. 35] incurred by the Trustee at any time in retaking the said vessel, or otherwise protecting its rights hereunder, and for any and all damages sustained by the Trustee from or by reason of any default or defaults of the Mortgagor.

Article XII

Possession

That the Mortgagor, until default shall have been made hereunder, may have the possession of said vessel and use and operate the same.

Article XIII

Preferred Mortgage

That the Mortgagor shall comply with and satisfy all the provisions of the "Ship Mortgage Act, 1920," and shall establish and maintain this mortgage as a first preferred mortgage under said Act.

Article XIV

Further Assurances

That in the event that this mortgage or said bonds, or any provisions thereof, be deemed invalidated in whole or in part by any present or future law of the United States, or any decisions of any authoritative court thereof, the Mortgagor shall execute such other or further instruments as in the opinion of counsel for the Trustee will carry out the true intent and spirit of this mortgage. From time to time the Mortgagor shall execute such further assurances as in the opinion of such counsel may be required to more [fol. 36] effectually subject the property hereby mortgaged, or intended to be mortgaged, to the payment of said principal sum and the bonds and coupons aforesaid.

Article XV

Remedies On Default

The Mortgagor covenants and agrees that if default shall be made in the payment of any of the bonds or coupons aforesaid, principal or interest, or any part thereof—or if any default or breach shall be made by the mortgagor in the observance or performance of any of its covenants or agreements herein contained, and if such default shall continue for fifteen (15) days—or if the Mortgagor be adjudged bankrupt—or if a receiver be appointed for its property—or if said vessel be sold or transferred to another

flag without the written consent of the Trustee—or if said vessel shall be attached in admiralty or otherwise levied upon or sequestered by legal proceedings and not released within fifteen (15) days—or if said vessel shall be removed from the limits of the Great Lakes—or if default be made by the Mortgagor resulting in any legal proceedings by the Trustee to enforce or protect any rights hereunder—then, and in each and every such event or events of default, the Trustee may declare all of the said bonds and coupons then outstanding to be immediately due and payable, anything therein to the contrary notwithstanding, and may take said vessel, without legal process, wherever the same may be, and [fol. 37] hold, charter, operate, or otherwise use the same, for such time, and on such terms, as it may deem to the best advantage of its trust; or, at its option, in each and every such event or events of default, the Trustee may, either with or without taking actual possession of said vessel, sell the same, free from any claim, title or estate of the Mortgagor, by first giving a printed notice of such sale for ten (10) successive days in some newspaper published in Detroit, Michigan, and by mailing a copy of such printed notice to the Mortgagor at its last known address; such sale may be held at such place and time as the Trustee may by such notices have selected and specified; and such sale may be conducted and concluded without bringing said vessel to the place of sale, and in such manner as the Trustee may deem to the best advantage of its Trust; at such sale the Trustee may become the purchaser; and the Mortgagor, for itself and for its successors and assigns, hereby makes, constitutes and appoints the said Trustee its true and lawful attorney for it, and in its name and stead, to make all necessary transfers of the vessel so sold, and for that purpose it is hereby fully authorized to make, execute and deliver, in the name of the Mortgagor, all necessary instruments of assignment and transfer, the Mortgagor hereby ratifying and confirming all that the said Trustee shall lawfully do by virtue hereof. Nevertheless, the Mortgagor shall, and will, if so requested by the Trustee, ratify and confirm such sale by executing and delivering to the purchaser of said vessel such proper bill of sale or conveyance [fol. 38] as may be designated in such request.

Article XVI

Receiver

That in case of an event of default and its continuation for the period, if any, specified in Article IV, then in each and every such case the Trustee may exercise the right of taking possession of the said vessel without legal process, and with any and all other rights, privileges, and powers granted herein and conferred; and the Trustee shall be entitled, as a matter of right, to the appointment of a receiver or receivers of the said vessel and of the earnings, income, revenue, rents, issues, or profits thereof.

Article XVII

Application of Proceeds

That the proceeds of any sale or foreclosure, the net earnings from any management, charter, or other use of the said vessel by the Trustee under any one of the powers above specified, the proceeds of any judgment collected by the Trustee for any default hereunder, the proceeds of any insurance and of any claim for damages on account of the vessel, received by the Trustee hereunder, shall be applied as follows:

1. To the payment of all expenses and charges, including the expenses of any sale, the expenses of any seizure or taking possession of said vessel, and any and all other ex- [fol. 39] penses or advances made or incurred by the Trustee in the protection of its rights hereunder and to the payment of any damages sustained by the Trustee from the default or defaults of the Mortgagor, with interest as provided for herein, and to provide adequate indemnity against liens claiming priority over this mortgage.

2. To the payment pro rata of all of said bonds and coupons whether due or not due, with interest to the date of such payment.

3. Any surplus thereafter remaining shall belong and be paid or returned to the Mortgagor.

Article XVIII

Discontinuance of Proceedings

That in case the Trustee shall have proceeded to enforce any right under this indenture, by foreclosure, entry or

otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to the Trustee, then and in every such case the Mortgagor and the Trustee shall be restored to their former positions and rights hereunder with respect to the property subject, or to become subject to this mortgage, and all rights, remedies, and powers of the Trustee shall continue as if no such proceedings had been taken.

Article XIX

No Waivers

That no delay or omission of the Trustee to exercise any [fol. 40] right or power accruing upon any default, shall impair any such right or power, or shall be construed to be a waiver of any such default or acquiescence therein; and every power and remedy given by this mortgage to the Trustee may be exercised from time to time and as often as may be deemed expedient by the Trustee.

Article XX

Discharge of Mortgage

Upon the payment of the bonds and coupons hereby secured, and the performance by the Mortgagor of all its obligations hereunder, the Trustee will discharge this mortgage according to law.

Article XXI

Successors and Assigns

All the covenants, stipulations, and agreements in this mortgage contained shall bind and enure to the benefit of the Mortgagor and Trustee, their respective successors and assigns.

Article XXII

Certificate of Enrollment and License

It is understood and agreed that Exhibit A hereto attached, is a true and complete copy of the last Consolidated Certificate of Enrollment and License of the said steam

screw vessel "Thomas Barlum," and is to be taken and read for all purposes of this mortgage as completely as [fol. 41] if the same had been inserted at length in the body hereof.

Article XXIII

Delivery of Bonds and Recognition of Bondholders

The bonds secured by this mortgage shall be certified and delivered by Trustee to the President of Mortgagor, whose receipt therefor shall be full protection to the Trustee for such certification and delivery.

The Trustee shall be under no obligation to recognize anyone as holder or owner of any of the bonds secured hereby, until he shall deposit such bonds with the Trustee and indemnify it to its satisfaction, against all expenses for which it might become liable in executing any request or demand of such person under this mortgage; if any of said bonds or coupons shall become mutilated, destroyed or lost, the Mortgagor may issue, and thereupon the Trustee will certify and deliver new bonds or coupons of like tenor and date, and bearing the same serial number as those mutilated, destroyed or lost, provided that the applicant therefor shall furnish both the Mortgagor and the Trustee with satisfactory evidence of such mutilation, destruction or loss, and, if requested, shall also furnish them with satisfactory indemnity against the missing obligation.

[fol. 42]

Article XXIV

Conditions of Acceptance of Trust

The Trustee hereby accepts the trusts created by this Mortgage, upon the following terms and conditions, to-wit:

(a) It shall incur no liability to anyone, but shall be fully protected in acting upon any notice, consent, certificate, bond or other document, believed by it to be genuine and to have been signed by the proper person.

(b) It may select and employ in and about the execution of said trusts, suitable agents and attorneys for whose acts or defaults it shall not be answerable, so long as they were selected with reasonable discretion.

(c) It shall be under no obligation to perform any act hereunder, unless requested in writing so to do, and unless indemnified to its full satisfaction for so doing.

(d) It shall be no part of the duty of Trustee to file or record this mortgage, or to effect insurance hereunder; or to keep informed as to the condition of said property, but it may, in its discretion, do any or all of these matters or require the same to be done; and any and all advances made or expenses incurred by it hereunder shall constitute an additional indebtedness secured hereby, and be prior in lien to the bonds hereunder.

The Trustee may divest itself of the trusts created by this mortgage and resign upon thirty (30) days' notice to the Mortgagor, and the due assignment and transfer of all its title and interest in the property hereby covered to [fol. 43] its successor; upon receipt of such notice it shall be the duty of the Mortgagor to call a meeting of the bondholders by printed notice published in a public newspaper circulating in Detroit, and by mailing a copy of such notice to each known bondholder at his last known address; at the time and place specified in such notice; a majority in amount of the bondholders present or legally represented shall be competent to elect such successor, who shall thereupon be vested with all of the estate hereunder of the present Trustee; in the event of the bondholders failing to meet or act, as aforesaid, such successor may be appointed by any court in the State of Michigan exercising equity or chancery jurisdiction.

Mortgagor will promptly pay to Trustee all annual and other fees agreed upon as Trustee's compensation, or if no such fees have been agreed upon, then Mortgagor will pay to Trustee when requested, such reasonable amounts as may be requested for any and all Trustee's services hereunder; all such fees shall be secured hereby.

Article XXV

Financial Statements: Alienation

The Mortgagor will furnish Trustee from time to time, as reasonably requested, true statements of its financial condition and it will not, without the consent of the Trustee, alienate or transfer any of the property hereby covered by this mortgage.

[fol. 44] In Witness Whereof, Barlum Steamship Company, Mortgagor, has hereunto caused its corporate seal to be affixed and this Mortgage to be signed by its President and attested by its Secretary, for and in its behalf; and the said Detroit and Security Trust Company, Trustee, to evidence its acceptance of the trust hereby created, has caused its corporate seal to be hereunto affixed and this Mortgage to be signed by its Vice-President and attested by its Assistant Secretary, for and in its behalf, all as of the first day of March, A. D. 1929.

Barlum Steamship Company, by (Sgd.) John J. Barlum, President.

Attest:

(Sgd.) Thos. J. Barlum, Secretary.

Signed, sealed and delivered in presence of:

As to John J. Barlum:
(Sgd.) John S. Kirk. (Sgd.) Edw. E. Gordon.

As to Thomas J. Barlum:
(Sgd.) H. E. Laupp. (Sgd.) H. A. Blaser.

United States Revenue Stamps in the amount of $100.00.

[fol. 45] Detroit and Security Trust Company, by (Sgd.) H. L. Stanton, Vice-President.

Attest:

(Sgd.) A. W. Massnick, Assistant Secretary.

Signed, sealed and delivered in presence of:

As to Harry L. Stanton:
(Sgd.) John S. Kirk. (Sgd.) Edw. E. Gordon.

As to A. W. Massnick:
(Sgd.) H. E. Laupp. (Sgd.) R. A. Blaser.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 7th day of March, A. D. 1929, before me appeared John J. Barlum, to me personally known, who being duly sworn, did say that he is President of Barlum Steamship Company, a corporation incorporated under and by virtue of the laws of the State of West Virginia, and that the seal affixed to said instrument is the corporate seal of

said corporation, and that said instrument was signed and [fol. 46] sealed in behalf of said corporation by authority of its Board of Directors, and the said John J. Barlum acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate, written.

(Sgd.) Cleveland Thurber, Notary Public, Wayne County, Michigan. My commission expires Oct. 7, 1930. (Notarial Seal.)

STATE OF WEST VIRGINIA,
County of Ohio, ss:

On this 22nd day of March, A. D. 1929, before me appeared Thomas J. Barlum, to me personally known who, being duly sworn, did say that John J. Barlum and Thomas J. Barlum are the President and Secretary, respectively, of Barlum Steamship Company, a corporation incorporated under and by virtue of the laws of the State of West Virginia, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said Thomas J. Barlum acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and [fol. 47] affixed my official seal, this the day and year first in this my certificate, written.

(Sgd.) Louis L. Reinacher, Notary Public, of, in and for Ohio County, West Virginia. My commission expires November 20, 1936. (Notarial Seal.)

STATE OF MICHIGAN,
County of Wayne, ss:

On this 19th day of March, A. D. 1929, before me appeared Harry L. Stanton, to me personally known, who, being duly sworn, did say that he is Vice-President of the Detroit and Security Trust Company, a corporation incorporated under and by virtue of the laws of the State of Michigan, and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation

by authority of its Board of Directors, and said Harry L. Stanton acknowledged the said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate, written.

(Sgd.) Edw. E. Gordon, Notary Public, Wayne County, Michigan. My commission expires Sept. 24, 1932. (Notarial Seal.)

[fol. 48] STATE OF WEST VIRGINIA,
County of Ohio, ss:

On this 22nd day of March, A. D. 1929, before me appeared A. W. Massnick, to me personally known, who, being duly sworn, did say that Harry L. Stanton and A. W. Massnick are the Vice-president and Assistant Secretary respectively, of the Detroit and Security Trust Company, a corporation incorporated under and by virtue of the laws of the State of Michigan, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said A. W. Massnick acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, this the day and year first in this, my certificate, written.

(Sgd) Louis L. Reinacher, Notary Public, of, in and for Ohio County, West Virginia. My commission expires November 20, 1936. (Notarial Seal.)

[fol. 49] STATE OF WEST VIRGINIA,
County of Ohio, ss:

On this 22nd day of March, A. D. 1929, before me came Thomas J. Barlum, to me known, who, being by me duly sworn, did depose and say that he resides in the City of Detroit, State of Michigan; that he is the Secretary of Barlum Steamship Company, the corporation described in and which executed the foregoing mortgage; that he knows the seal of said corporation; that the seal affixed to said instrument is the seal of said Barlum Steamship Company; that said seal was so affixed by order of the Board of Direc-

tors of said corporation, and that he signed his name thereto by like order. And the said Thomas J. Barlum acknowledged to me that he executed said mortgage as the Secretary of the said Barlum Steamship Company; that the same is the free and voluntary act and deed of said Barlum Steamship Company and of himself as said Secretary, for the uses and purposes therein expressed.

(Sgd.) Louis L. Reinacher, Notary Public, of, in and for Ohio County, West Virginia. My commission expires November 20, 1936. (Notarial Seal.)

[fol. 50] STATE OF MICHIGAN,
County of Wayne, ss:

John J. Barlum, being duly sworn, deposes and says that he is the President of the Barlum Steamship Company, the corporation described in and which executed the above and foregoing mortgage; that said mortgage was so executed by said Barlum Steamship Company in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the said Barlum Steamship Company, or any lienor of the mortgaged vessel, that this affidavit was made pursuant to an order of the Board of Directors of the said Barlum Steamship Company.

(Sgd.) John J. Barlum.

Subscribed and sworn to before me this 7th day of March, A. D. 1929. (Sgd.) Cleveland Thurber, Notary Public, Wayne County, Michigan. My commission expires Oct. 7, 1930. (Notarial Seal.)

We, the undersigned, John J. Barlum and Thomas J. Barlum, being respectively the President and Secretary of Barlum Steamship Company, hereby certify and acknowledge that at a meeting of the stockholders of said Barlum Steamship Company, held at 3456 Penobscot Building, [fol. 51] Detroit, Wayne County, Michigan, on the 7th day of March, A. D. 1929, called for the purpose and upon the notice required by law, more than two-thirds (2/3) of the stockholders of the Company consented to the execution of a mortgage upon the property of the Company, to be dated March 1, 1929, and to secure two hundred thousand dollars ($200,000.00) of bonds of said Barlum Steamship Company, and the interest thereon, said mortgage being the

foregoing mortgage, executed by said Barlum Steamship Company to Detroit and Security Trust Company, as Trustee.

In Witness Whereof, we have hereunto subscribed our names as President and Secretary, respectively, of said Barlum Steamship Company, and have caused the seal of said corporation to be hereunto affixed.

(Sgd.) John J. Barlum, President; (Sgd.) Thos. J. J. Barlum, Secretary. (Corporate Seal.)

STATE OF MICHIGAN,
County of Wayne, ss:

On this 7th day of March, A. D. 1929, before me, a Notary Public, in and for said county, personally appeared John J. Barlum, known to me to be the President of Barlum Steamship Company and to be the same person who subscribed the foregoing certificate, who acknowledged that [fol. 52] he subscribed the same as such President and that the same is his free act and deed.

(Sgd.) Cleveland Thurber, Notary Public, Wayne County, Michigan. My commission expires Oct. 7, 1930. (Notarial Seal.)

Form No. 9

STATE OF WEST VIRGINIA,
County of Ohio, ss:

I, Raymond J. Falland, Clerk of the County Court for the County aforesaid, which is a Court of Record, having a seal, do hereby certify that Louis L. Reinacher whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument, and therein written, was at the time of taking such proof or acknowledgment, a Notary Public, in and for said County duly commissioned and qualified, and duly authorized to take the same. And I believe his signature thereto is genuine. And I further certify that his commission expires November 20, 1936.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Wheeling, this 22nd day of March, A. D. 1929.

(Sgd.) Raymond J. Falland, Clerk. (Seal of Court.)

[fol. 53] STATE OF WEST VIRGINIA,
County of Ohio, ss:

On this 22nd day of March, A. D. 1929, before me, a Notary Public, in and for said county and state, personally appeared Thomas J. Barlum, known to me to be the Secretary of Barlum Steamship Company, and to be the same person who subscribed the foregoing certificate, who acknowledged that he subscribed the same as Secretary and that the same is his free act and deed.

(Sgd.) Louis L. Reinacher, Notary Public, of, in and for Ohio County, West Virginia. My commission expires November 20, 1936. (Notarial Seal.)

I, Thomas J. Barlum, of Detroit, Michigan, swear that I am Secretary of the Barlum Steamship Company, a corporation organized under the laws of the State of West Virginia; that said corporation is the sole owner of all the vessel called "Thomas Barlum," of Detroit, official number 204798, gross tonnage 5752, net tonnage 4485, built in 1908, at Wyandotte, Michigan, as appears by P. E. No. 51, issued at Detroit, April 17, 1908, now surrendered, corporation officer changed; that I am a citizen of the United States of America; that the president and managing directors of said [fol. 54] corporation are citizens of the United States of America; that seventy-five per centum (75%) of the interest in said corporation is owned by citizens of the United States of America; that the title to seventy-five per centum (75%) of the stock of said corporation is vested in citizens of the United States of America free from any trust or fiduciary obligation in favor of any person not a citizen of the United States of America, and that such proportion of the voting power of said corporation is vested in citizens of the United States; that through no contract or understanding is it so arranged that more than twenty-five per centum (25%) of the voting power of said corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States of America; that by no means whatsoever is the control of any interest in said corporation in excess of twenty-five per centum (25%) conferred upon or permitted to be exercised by any person

who is not a citizen of the United States of America; that Richard A. Cain, the present master of said vessel, is also a citizen of the United States of America, having been born in ——.

(Sgd.) Thos. J. Barlum.

Subscribed and sworn to before me this 7th day of March, 1929. Cleveland Thurber, Notary Public, Wayne County, Mich. My commission expires Oct. 7, 1930. (Notarial Seal.)

[fol. 55] STATE OF MICHIGAN,
County of Wayne, ss:

On this 25th day of March, 1929, before me came A. W. Massnick, to me known, who being by me duly sworn, did depose and say:

1. That he is Assistant Secretary of Detroit and Security Trust Company, a Michigan corporation, Trustee, the Mortgagee referred to in the within mortgage:

2. That upwards of seventy-five per cent (75%) of the stock of said corporation is owned by citizens of the United States;

3. That the president and managing directors of said corporation are citizens of the United States;

4. That said corporation is a citizen of the United States within the meaning of the Merchant Marine Act of 1920.

Further deponent saith not.

(Sgd.) A. W. Massnick.

Subscribed and sworn to before me this 25th day of March, A. D. 1929. (Sgd.) Harper P. Gallup, Notary Public, Wayne County, Michigan. My commission expires Sept. 1, 1931. (Notarial Seal.)

[fol. 56] Cat. No. 1273

THE UNITED STATES OF AMERICA:

Department of Commerce, Bureau of Navigation

Permanent or Temporary: Permanent.
Certificate No. 11.
Official No.: 204798.

Letters: ——.
Measured at Detroit, Mich., 1907.
Rebuilt at: ——, 19—.
Remeasured at: ——, 19—.
Radio call: Coal Burner.
Service: Freight.
Number of Crew, including Master: 19.
Horsepower: 1650.

Consolidated Certificate of Enrollment and License

(Northern, Northeastern, and Northwestern Frontiers of the United States, Otherwise Than By Sea)

(Sections 4319 and 4321, Rev. Stats., and Act of April 24, 1906, as Amended By Act of February 29, 1912

In Conformity to Title L, "Regulation of Vessels in Domestic Commerce," of the Revised Statutes of the United States

Thomas J. Barlum, of Detroit, Mich., having taken and [fol. 57] subscribed the oath required by law, and having sworn that he is a citizen of the United States and Secretary of the Barlum Steamship Company, a body corporate under the laws of the State of West Virginia, with principal office at Detroit, Mich., that the said company is a citizen of the United States as defined in Section 38, Merchant Marine Act, 1920, for operating vessels in the coastwise trade.

Custom House, Port of Detroit, Mich., March 15, 1927.
Certified to be a true copy from the records of this office.
(Sgd.) F. J. Heffner, Deputy Collector of Customs.

and the sole owner of the vessel called the Thomas Barlum, of Detroit, and that the said vessel was built in the year 1907, at Wyandotte, Mich., of steel as appears by P. E. No. 16 issued at Detroit, Feb. 18, 1919, now surrendered, corporation officer changed and said enrollment having certified that the said vessel is a steam screw; that she has one deck, two masts, a plain head, and a round stern; that her register length is 480.0 feet, her register breadth 52.2 feet, her register depth 30.0 feet, her height — feet; that she measures as follows:

	Tons	100ths
Capacity under tonnage deck	5331	13
Capacity between decks above tonnage deck	....	..
Capacity of inclosures on the upper deck, viz.: [fol. 58] Forecastle, —; bridge, —; poop, —; break, —; houses—round, —, side, —, chart, —, radio, —; excess hatchways, —; light and air	220	93
Gross tonnage	5752	06

Deductions under Section 4153, Revised Statutes, as amended:

Crew space, 128.52; Master's cabin, 24.86; Steering gear, 22.98; Anchor gear, 32.60; Boatswain's store, —; Chart house, —; Donkey engine and boiler, —; Radio house, —; Storage of sails, —; Propelling power (actual space —), 105.61.		
Total deductions	1266	57
Net tonnage	4485	

License

And Richard A. Cain, the master, having sworn that he is a citizen of the United States, that this license shall not be used for any other vessel, or for any other employment than is herein specified, or in any trade or business whereby the revenue of the United States may be defrauded:

License is hereby granted for the said vessel to be em- [fol. 59] ployed in carrying on the Coasting And Foreign Trade for One Year from the date hereof, and no longer.

Given under my hand and seal at the Port of Detroit, District of Mich., No. 38, this 15th day of March, in the year One Thousand Nine Hundred and Twenty-seven.

(Sgd.) C. E. Scheffler, Deputy Collector of Customs.
(Seal.)

No. —.
Comptroller of Customs.

Cat. No. 1273

Department of Commerce, Bureau of Navigation

Permanent

(Permanent or Temporary)

Frontier

Consolidated Enrollment and License for the Coasting and Foreign Trade, No. 11, of the steam screw called the Thomas Barlum of Detroit, 5752 gross, 4485 net, issued at the Port of Detroit March 15, 1927

[fol. 60] Preferred Mortgage Indorsement of Vessel of 200 Gross Tons and Over (Merchant Marine Act, 1920, Sec. 30)

Mortgage Description

(Subsection DC)

Mortgagor: Barlum Steamship Company.
Mortgagee: Detroit Trust Company, Trustee.
Indorsed: March 15, 1927, at 2:50 p. m.
Total amount: $75,000.00.
Date of maturity: February 15, 1930.
Discharge amount: $75,000.00, plus interest at 6%.
Port of: Detroit, Michigan.

(Sgd.) C. E. Scheffler, Deputy Collector of Customs.
(Seal.)

Office of the Collector of Customs, Port of Detroit, Michigan

March 28th, 1929.

Received for record March 25, 1929, at 12:49 p. m.
Recorded in Book "V" of Mortgages, page 66.
Indorsed on vessels marine document on March 28, 1929, at 3:00 p. m. (P. E. No. 11, issued at Detroit, March 15, 1927).

(Sgd.) F. J. Heffner, Acting Deputy Collector.
(Seal.)

(Here follows Exhibit B, side folio 60a)

[fol. 60-a]

Cat. No. 1331
Arts. 61, 62 and 63, Customs Regulations, 1923

Abstract and Certificate of Record of Title of

Grantor	Grantee	Kind of conveyance
Detroit Shipbuilding Company	Postal Steamship Company	Master Carpenter's Cert
First document, T. E. No. 51, issued at Detroit, April 17, 1908, to		Postal Steamship Comp
Postal Steamship Company	Barlum Steamship Company	Bill of Sale
Barlum Steamship Company	Detroit Trust Company	Preferred Trust Mortga
Detroit Trust Company, Trustee	Barlum Steamship Company	Trust Mortgage Discha
Barlum Steamship Company	Detroit Trust Company, Trustee	Preferred Trust Mortga
Detroit and Security Trust Company	Barlum Steamship Company	Trust Mortgage Discha
Barlum Steamship Company	Detroit and Security Trust Company, Trustee	Preferred Trust Mortga

NOTE: This certificate is issue

I Hereby Certify that the foregoing is a true Abstract of Conveyanc Customhouse, Detroit, Michigan. February 16, 1931, 12:30 P. M.

(On reverse side:)

Department of Commerce,

Bureau of Navigation

Name of owners and amounts owned, as shown by Marine Document P. E. No. 11, issued at Detroit, Michigan, on March 15, 1927:

Barlum Steamship Company of Detroit, Michigan, sole owner.

Cat. No. 1331

Department of Commerce,

Bureau of Navigation

Office of Collector of Customs, Port of Detroit, Michigan

——, 192—.

Abstract and certificate of record of title of the Steam Screw Thomas Barlum (204798), of Detroit, Michigan.

EXHIBIT B TO LIBEL

rtificate of Record of Title of the Steam Screw Called the Thomas Barlum (204798) of Detroit, Michigan, as Provided for by R. S. 4194, Section 1, Act Ju

		Date of conveyance			Consideration	Received for record				Book of record				Amount of maturity		D of m
	Kind of conveyance	Month	Day	Year	Dollars Cts.	Month	Day	Year	Hour Minute	Bill of sale	Mortgage	Page	Part conveyed	Dollars Cts.	Year	M
ompany	Master Carpenter's Certificate	April	15	1908		April	15	1908	Mast. Carpr. Certs.			19	All			
d 17, 1908, to Postal Steamship Company, surrendered at Cleveland, Ohio, April 27, 1908.																
Company	Bill of Sale	Jan.	17	1919	1.00	Feb.	18	1919	10:30 A. M.	6		24	All			
pany	Preferred Trust Mortgage	Dec.	1	1924	$100,000.00	Dec.	22	1924	9:45 A. M.		"T"	47	All	$100,000.00	1928	D
Company	Trust Mortgage Discharge	Feb.	15	1927	$100,000.00	Mar.	15	1927	12:30 P. M.		"T"	47	All			
pany, Trustee	Preferred Trust Mortgage	Feb.	15	1927	$75,000.00	Mar.	15	1927	12:45 P. M.		"V"	21	All	$75,000.00	1930	D
Company	Trust Mortgage Discharge	Mar.	25	1929	$75,000.00	Mar.	25	1929	12:48 P. M.		"V"	21	All			
ty Trust tee	Preferred Trust Mortgage	Mar.	1	1929	$200,000.00	Mar.	25	1929	12:49 P. M.		"V"	66	All	$200,000.00 with interest at 6% per annum	1935	F

NOTE: This certificate is issued under the provisions of Subsection I (1), Section 30, Merchant Marine Act, 1920, and further title instruments, if tendered for recording, will be recorded in th

s a true Abstract of Conveyances of the Steam Screw called the Thomas Barlum, now of Detroit, Michigan, as appears by the Index of Conveyances and Re
ebruary 16, 1931, 12:30 P. M. F. J. H

rce,

n

as shown by Marine
etroit, Michigan, on

troit, Michigan, sole

rce,

n

f Detroit, Michigan

——, 192—.

f title of the Steam
roit, Michigan.

EXHIBIT B TO LIBEL

the Thomas Barlum (204798) of Detroit, Michigan, as Provided for by R. S. 4194, Section 1, Act June 19, 1886, and T. D. 22878.

Consideration	Received for record					Book of record			Part conveyed	Amount of maturity	Date of maturity			Date of indorsement on marine document				Port where indorsed
Dollars Cts.	Month	Day	Year	Hour	Minute	Bill of sale	Mortgage	Page		Dollars Cts.	Year	Month	Day	Year	Month	Day	Hr. Min.	
	April	15	1908			Mast.	Carpr. Certs.	19	All									
Ohio, April 27, 1908.																		
1.00	Feb.	18	1919	10:30	A. M.	6		24	All									
$100,000.00	Dec.	22	1924	9:45	A. M.		"T"	47	All	$100,000.00	1928	Dec.	1	1924	Dec.	22	9:45 A. M.	Detroit
$100,000.00	Mar.	15	1927	12:30	P. M.		"T"	47	All					1927	Mar.	15	12:35 P. M.	Detroit
														1927	Mar.	15	4:30 P. M.	(Recorded)
$75,000.00	Mar.	15	1927	12:45	P. M.		"V"	21	All	$75,000.00	1930	Feb.	15	1927	Mar.	15	2:50 P. M.	Detroit
														1929	Mar.	28	3:10 P. M.	(Recorded)
$75,000.00	Mar.	25	1929	12:48	P. M.		"V"	21	All					1929	Mar.	28	3:00 P. M.	Detroit
$200,000.00	Mar.	25	1929	12:49	P. M.		"V"	66	All	$200,000.00 with interest at 6% per annum	1935	Feb.	1	1929	Mar.	28	3:12 P. M.	(Recorded)
														1929	Mar.	28	3:01 P. M.	Detroit

tion I (1), Section 30, Merchant Marine Act, 1920, and further title instruments, if tendered for recording, will be recorded in this office.

lled the Thomas Barlum, now of Detroit, Michigan, as appears by the Index of Conveyances and Records in this Office.

F. J. Heffner, Acting Deputy Collector of Customs. (Seal.)

[fol. 61] EXHIBIT C TO LIBEL

Barlum Steamship Company, Detroit, Michigan.

GENTLEMEN: Please take notice that the Preferred Mortgage of the Steamer "Thomas Barlum" made by you as Mortgagor to Detroit and Security Trust Company, as Trustee, now known as Detroit Trust Company, Trustee, on March 1, 1929, recorded on March 25, 1929, in Book "V" of Mortgages, page 66, Office of the Collector of Customs, Port of Detroit, Michigan, is in default, and has been in default since February 1, 1931, on account of your failure to pay when due, on February 1, 1931, twenty-five thousand dollars ($25,000.00) of principal of said mortgage, consisting of Bonds numbered one (1) to twenty-five (25), inclusive.

The undersigned, on behalf of the bondholders, hereby declares the entire amount of said mortgage immediately due and payable, pursuant to Article XV of said mortgage, the said default having continued for more than fifteen (15) days.

The undersigned, on behalf of the bondholders, hereby demands payment by you of the entire amount of said mortgage, to-wit: the sum of two hundred thousand dollars ($200,000.00) with interest thereon in addition at the rate of six per centum (6%) per annum from February 1, 1931, to date of payment.

Detroit Trust Company, Trustee (formerly known as Detroit and Security Trust Company, Trustee), by (Sgd.) A. W. Massnick, Trust Officer.

Dated at Detroit, Michigan, April 22, 1931.

[fol. 62] IN UNITED STATES DISTRICT COURT

LIBEL—No. 1795

To the Honorable Judges of the United States District Court for the Western District of New York:

The Libel of Detroit Trust Company, a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, as Trustee, against The Steamer John J. Barlum, her engines, boilers, boats, machinery,

tackle, apparel, furniture and other appurtenances, and against all persons having or claiming any interest therein, in a cause civil and maritime, of foreclosure of a preferred mortgage, alleges on information and belief and respectfully shows unto this Honorable Court as follows:

First: Libelant at all times hereinafter mentioned was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, and having its principal office and place of business in the City of Detroit, in the said State of Michigan.

Second: That the said Steamer John J. Barlum is, and at all times mentioned in this libel was, a vessel of the [fol. 63] United States of the burden of 20 tons and upwards, to-wit, 6419 tons gross, and 4924 tons net register, duly enrolled for the coasting trade of the United States and the Great Lakes and their connecting and tributary waters, and is now within the Western District of New York, to-wit, at the Port of Buffalo and within the jurisdiction of this Honorable Court.

Third: That on or about December 15, 1927, the Barlum Steamship Company, a West Virginia corporation, having an office in the City of Detroit in the State of Michigan, was the sole owner of the whole of the said Steamer John J. Barlum, and the said Barlum Steamship Company being justly indebted to libelant herein in the sum of two hundred thousand dollars ($200,000.00) evidenced by its certain bonds in the aggregate principal sum of $200,000.00 maturing serially as hereinafter more particularly described, and for the purpose of securing the payment of the said indebtedness and interest thereon as evidenced by said bonds and the coupons attached thereto, and with the intention of granting libelant a preferred mortgage on the said Steamer John J. Barlum, did execute and deliver such preferred mortgage on the whole of the said Steamer John J. Barlum on or about January 5, 1928. A true copy of said preferred mortgage is attached hereto, made a part hereof and marked "Exhibit A,' and libelant begs leave to refer thereto for all the terms and conditions and provisions therein contained as though the same were herein fully and at large set forth.

[fol. 64] Fourth: Said preferred mortgage was duly filed for record in the office of the Collector of Customs at

Detroit, Michigan, the home port of said vessel, and was duly recorded in said office of the Collector of Customs in Book V of Mortgages, page 53, at 11:30 o'clock a. m., on January 5, 1928, which said record shows the name of the vessel, the names of the parties to the mortgage, the time and date of the reception of the mortgage, the interest in the vessel mortgaged and the amount and date of maturity of the mortgage in accordance with Section 30, Subsection (c) of the Merchant Marine Act of Congress of June 5, 1920, known as the "Ship Mortgage Act 1920." An abstract and certificate of record of title of said vessel, dated February 16, 1931, duly certified under the seal of the Collector of Customs for the Port of Detroit by F. J. Heffner, Acting Deputy Collector of Customs of the Port of Detroit, Michigan, is attached hereto, made a part hereof, and marked "Exhibit B."

Fifth: That said preferred mortgage was endorsed upon the Marine Document of said Steamer John J. Barlum in accordance with the provisions of said Ship Mortgage Act 1920. That an affidavit was filed with the record of said mortgage to the effect that the mortgage was made in good faith and without any design to hinder, delay or defraud any existing or future creditors of the mortgagor or any lienor of the mortgaged vessel, a true copy of which affidavit is attached to the copy of the mortgage which is annexed hereto as Exhibit A. That said mortgagee, [fol. 65] Detroit Trust Company, as Trustee, by Nathan C. Mente, its Assistant Secretary, made affidavit which was filed with the record of said mortgage, to the effect that the said Detroit Trust Company was then a citizen of the United States within the meaning of Section 2 of the Shipping Act of 1916, as amended by the Merchant Marine Act of June 5, 1920, that said mortgage still is a citizen of the United States within the meaning of said Acts, that the said preferred mortgage did not stipulate that the mortgagee waived the preferred status thereof, that all of the acts and things required to be done by the said Merchant Marine Act of June 5, 1920, in order to give the said mortgage the status of a preferred mortgage were duly done or caused to be done either by libelant or by the Collector of Customs of the Port of Detroit.

Sixth: That the Collector of Customs for the Port of Detroit, Michigan, upon the recording of said preferred

mortgage, delivered two certified copies thereof to the mortgagor, the said Barlum Steamship Company, which through its officers or agents placed and used due diligence to retain one copy on board the Steamer John J. Barlum and caused the said copy and the documents of the said vessel to be exhibited by the master to any person having business with the vessel which might give rise to a maritime lien upon the said vessel, or to the sale, conveyance or mortgage thereof, and at all times since then the master of said vessel, upon the request of any such person has [fol. 66] exhibited to him the documents of said vessel and the copy of said preferred mortgage placed on board thereof.

Seventh: That said preferred mortgage stated the interest of the mortgagor in the Steamer John J. Barlum and the interest conveyed or mortgaged, and before the same was recorded said mortgage had been duly acknowledged according to law.

Eighth: On the 15th day of December, 1930, bonds Nos. 1 to 50, inclusive, aggregating fifty thousand dollars ($50,000.00) in principal amount, fell due and were duly presented for payment at the office of Detroit Trust Company in Detroit, Michigan, and demand for payment thereof made, but the said Barlum Steamship Company refused and neglected and ever since has refused and neglected to pay the principal amount of said bonds so maturing, or any part thereof.

Ninth: Article XV of said preferred mortgage provides in part as follows:

"* * * If default shall be made in the payment of any of the bonds or coupons aforesaid, principal or interest, or any part thereof,—* * * and if such default shall continue for fifteen (15) days—* * * the Trustee may declare all of the said bonds and coupons then outstanding immediately due and payable, anything therein to the contrary notwithstanding. * * *"

Tenth: That pursuant to the provisions of said preferred mortgage and particularly to the provisions of Article XV [fol. 67] thereof, libelant as mortgagee under said preferred mortgage has declared all of the said principal sum secured thereby and the said outstanding bonds herein-

above referred to to be immediately due and payable; that a copy of the letter by which such declaration was made is annexed hereto and marked "Exhibit C"; that the original of said letter has been personally served on John J. Barlum, President of the Barlum Steamship Company, respondent herein and mortgagor under said preferred mortgage of December 15, 1927.

Wherefore, libelant prays:

I. That process in due form of law, according to the course and practices of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said Steamer John J. Barlum, her engines, boilers, boats, etc., and that all persons having or claiming any interest therein may be cited to appear and answer all matters aforesaid, and that the Steamer John J. Barlum, her engines, boilers, boats, etc., may be condemned and sold to pay the demands and claims aforesaid with interest and costs, and to pay any and all other amounts required to be paid by the mortgagor to mortgagee under the said preferred mortgage with interest and costs, and that libelant may have such other and further relief as in law and justice it may be entitled to receive.

II. That the said preferred mortgage, dated the 15th day [fol. 68] of December, 1927, executed and delivered by the Barlum Steamship Company to Detroit Trust Company, as Trustee, may be declared to be a valid and subsisting lien upon the said Steamer John J. Barlum, her engines, boilers, boats, etc., in said preferred mortgage described and thereby conveyed and transferred prior and superior to the interests, liens or claims of any and all persons, firms or corporations whatsoever, except such persons, firms or corporations as may hold preferred maritime liens on the said vessel.

III. That in default of the payment of the sums found to be due and payable to your libelant under the said preferred mortgage within the time to be limited by a decree of this Honorable Court, together with a sum sufficient to pay the costs of this suit, it may be decreed that any and all persons, firms and corporations claiming any interest in the said steamer are forever barred and foreclosed of and from all right or equity of redemption or claim of, in or

to the said Steamer John J. Barlum, her engines, boilers, boats, etc., and every part thereof.

IV. That pending final disposition of said vessel this Honorable Court will appoint Detroit Trust Company, of Detroit, Michigan, or some other suitable person, receiver of said vessel with authority to operate the same subject to the further order of this Court as provided by Section L of said Ship Mortgage Act 1920.

V. That this Honorable Court shall direct the manner in [fols. 69 & 70] which actual notice of the commencement of this suit shall be given by the libelant to the master, other ranking officer or caretaker of the Steamer John J. Barlum, and to any person, firm or corporation who has recorded a notice of claim or an undischarged lien upon the vessel as provided in Subsection (k) of Section 30 of said Ship Mortgage Act 1920.

Detroit Trust Company, Trustee, by (Sgd.) C. T. Darnton, Vice-President. Miller, Canfield, Paddock & Stone, 3456 Penobscot Building, Detroit, Michigan; Stanley & Gidley, Marine Trust Company Bldg., Buffalo, New York, Proctors for Libelant.

Duly sworn to by C. T. Darnton. Jurat omitted in printing.

[fol. 71] EXHIBIT A TO LIBEL

Preferred Mortgage

Steamer "John J. Barlum," Barlum Steamship Company to Detroit Trust Company

Index

	Page
Parties	1
Resolutions	1
Bond	1–5
Description	6–7
Assumpsit	7
Redemption	8

	Page
Covenants and agreements	8
Article I. Authority to mortgage	9
Article II. Warranty of title	9
Article III. Insurance	9–11
Article IV. Use of vessel	11
Article V. Liens	11–12
Article VI. Notice of mortgage	12
Article VII. Release of attachments	12
Article VIII. Keep vessel repaired	12
Article IX. Inspection by trustee	13
Articles X. Taxes, etc.	13
Article XI. Trustee may remedy defaults	13–14
Article XII. Possession	14
Article XIII. Preferred mortgage	14
Article XIV. Further assurances	14–15
Article XV. Remedies on default	15–16
[fol. 72] Article XVI. Receiver	16–17
Article XVII. Application of proceeds	17–18
Article XVIII. Discontinuance of proceedings	18
Article XIX. No waivers	18
Article XX. Discharge of mortgage	18–19
Article XXI. Successors and assigns	19
Article XXII. Certificate of enrollment, etc.	19
Article XXIII. Delivery of bonds, etc.	19–20
Article XXIV. Temporary promissory note	20
Article XXV. Conditions of acceptance of trust	20–22
Article XXVI. Financial statements: Alienation	23
Signatures	22–23
Acknowledgments	23–25
Affidavit of good faith	25–26
Affidavit of consent of stockholders	26–27
Oath of secretary Barlum Steamship Company	27–28
Oath of vice-president Detroit Trust Company	29–30
Consolidated certificate of enrollment and license	31

This Mortgage, Made this fifteenth day of December, A. D. 1927, by and between Barlum Steamship Company, a corporation organized under the Laws of the State of West Virginia, party of the first part (hereinafter called the Mortgagor), and Detroit Trust Company, a Michigan cor- [fol. 73] poration having its principal place of business in

the City of Detroit, Michigan, as Trustee, for the uses and purposes heerinafter expressed, party of the second part (hereinafter called the Trustee)—

Witnesseth

Whereas, the Mortgagor is the sole owner of the steam screw vessel called the "John J. Barlum," of Detroit, official number 206279, of about 6419.47 gross tons and 4924 net tons register, hereinafter more particularly described, which said vessel is duly enrolled as a vessel of the United States in the office of the Collector of Customs at the Port of Detroit, her home port; and

Whereas, the Mortgagor, by resolutions of its stockholders and directors has duly authorized, made and delivered an issue of its first and preferred mortgage bonds to the amount of two hundred thousand dollars ($200,000.00), in substantially the following form, to-wit:

UNITED STATES OF AMERICA,
State of West Virginia:

Barlum Steamship Company Six Per Cent First and Preferred Mortgage Gold Bond

No. —. $1,000.00

Know All Men By These Presents, That the Barlum Steamship Company, a corporation organized under the laws of the State of West Virginia, for value received, ac- [fol. 74] knowledges itself to owe and hereby promises to pay to the bearer, or if registered, to the registered holder hereof, the sum of one thousand dollars ($1000.00) at maturity of this bond as hereinafter fixed, together with interest thereon from the fifteenth day of December, 1927, until so paid, at the rate of six per centum (6%) per annum, payable semi-annually, on the fifteenth days of June and December in each year, in accordance with the terms of, and upon presentation and surrender of, the coupons hereto attached, as they severally mature, both principal and interest being payable at the office of Detroit Trust Company, Detroit, Michigan, in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed on December 15, 1927.

Said Barlum Steamship Company will pay the principal and interest of this bond without deduction for taxes,

charges and/or assessments as set forth in the Mortgage hereinafter described.

This bond is one of two hundred (200) bonds, numbered consecutively from one (1) to two hundred (200), both numbers inclusive, aggregating two hundred thousand dollars ($200,000.00) in principal amount, for the principal sum of one thousand dollars ($1000.00) each, all bearing the same date, and which become due and payable in four (4) annual series, as follows, to-wit:

$50,000.00—Bonds Nos. 1- 50, Inclusive, December 15, 1930
50,000.00—Bonds Nos. 51-100, Inclusive, December 15, 1931
50,000.00—Bonds Nos. 101-150, Inclusive, December 15, 1932
50,000.00—Bonds Nos. 151-200, Inclusive, December 15, 1933

[fol. 75] with interest at the rate of six per centum (6%) per annum, payable semi-annually, all as set forth in the said bonds and the coupons thereof and the mortgage hereinafter referred to, all of said bonds being issued by the said Barlum Steamship Company, and proportionately secured both as to principal and interest, without preference or priority of security of one bond over another, by a certain first and preferred mortgage bearing even date herewith, duly made and delivered by the said Barlum Steamship Company, to Detroit Trust Company, of Detroit, Michigan, as Trustee, upon the Steamer "John J. Barlum," which mortgage is to be recorded in the Office of the Collector of Customs for the Port of Detroit, Michigan, as a preferred mortgage on said Steamer "John J. Barlum," to which mortgage reference is hereby made for a description of the mortgaged property, the rights of the holders of the bonds secured by the same, and the terms and conditions under which said bonds are issued and secured.

It is expressly agreed and made a part hereof that this bond, before its absolute date of maturity, may, at the option of the said Barlum Steamship Company, be redeemed and paid on any interest payment day, upon payment by said Barlum Steamship Company to the holder hereof, or to the Trustee for the benefit of the holder hereof, of the principal hereof and all interest due hereon at the date fixed for such redemption, together with a premium of one-half [fol. 76] of one per centum (½ of 1%) of the principal, all upon the terms and conditions specified in said mortgage; such redemption and payment, if made, to be in the inverse numerical order of the bonds then outstanding.

This bond shall pass by delivery, unless registered, but it may be registered as to principal in the owner's name on the books of Detroit Trust Company, at its office in Detroit, Michigan, such registry being noted hereon by said Trust Company, after which registration only such registered owner or the legal representative of such owner shall be entitled to receive the principal hereof, and no transfer shall be valid unless made on said Trust Company's books by the registered owner in person, or by the legal representative of such owner, and similarly noted hereon, but the same may be discharged from registry by transfer to bearer, after which it shall be transferable by delivery, but it may be registered again as above. Such registry shall not, however, affect the negotiability of the coupons, which shall always be transferable by delivery.

This bond shall not be valid or become obligatory for any purpose until the "Trustee's Certificate" endorsed hereon is executed by said Detroit Trust Company, Trustee.

In Witness Whereof, the said Barlum Steamship Company has caused this bond to be executed in its behalf by its President and Secretary, and its corporate seal to be hereunto affixed, and the coupons hereon to be authenti- [fol. 77] cated by the facsimile signature of its Treasurer, this fifteenth day of December, A. D. 1927.

Barlum Steamship Company, by —— ——, President
and —— ——, Secretary. (Seal.)

(Form of Coupon)

No. —. $30.00

On the first day of ——, A. D. 19—, Barlum Steamship Company will pay to bearer $30.00 in United States Gold Coin at the office of Detroit Trust Company, Detroit, Michigan, without deduction for any taxes, charges and/or assessments payable by them as set forth in said bonds, being six months' interest due that day upon its First and Preferred Mortgage Gold Bond of December 15, 1927, No—.

Barlum Steamship Company, by —— ——, Treasurer.

(Trustee's Certificate)

This Is To Certify that this bond is one of an issue of bonds described in the mortgage within mentioned.

Detroit Trust Company, Trustee, by —— ——, Assistant Vice-President; —— ——, Assistant Secretary; —— ——, Assistant Treasurer.

[fol. 78] (Notice)

Nothing can be written on this bond except by an officer of Detroit Trust Company as Registrar, without impairing its negotiability.

Date	In Whose Name Registered	Registrar
.....	.....	.....

(Form of Guaranty)

For Value Received, I, John J. Barlum, of Detroit, Michigan, do hereby guarantee payment of the within bond and coupons, as and when the same shall become due, principal and interest, and of any extension thereof, in whole or in part, and I hereby waive presentment for payment, demand, protest and notice of protest and nonpayment, and also agree that I shall in no respect be released from the obligation of this guaranty by any act or proceeding taken under any of the provisions of the mortgage mentioned in said bond, or by any extension of the time of payment thereof.

——— ———. (L. S.)

And Whereas, the Mortgagor, with the consent of more than two-thirds (2/3) of its stockholders in writing and by resolution of its Board of Directors duly adopted, has duly authorized and directed the execution and delivery of this first and preferred mortgage to the Trustee, for the purpose of fully securing the payment of said bonds and coupons and the performance of all the conditions and covenants herein contained,

Now, Therefore, This Mortgage Witnesseth:

That in consideration of the premises and of the sum of [fol. 79] one dollar ($1.00) to it duly paid by the Trustee, at or before the sealing and delivery of these presents, and for other valuable considerations, the receipt whereof is hereby acknowledged, and in order to secure the due and punctual payment of said bonds and coupons according to their tenor and effect, and the due performance of all the covenants, provisions, agreements and conditions thereof and of this mortgage, and to secure all the holders of said

bonds and coupons equally and with like effect and without any priority or preference of any one bond over another, save as in said bonds provided, the said Mortgagor, in the due exercise of its corporate powers, has granted, bargained, sold, conveyed, transferred, hypothecated and mortgaged, and by these presents does hereby grant, bargain, sell, convey, transfer, hypothecate and mortgage, unto the said Trustee, its successors and assigns, forever, all of the following described property, to-wit:

"That certain steam screw vessel called the 'John J. Barlum,' of Detroit, official number 206279, of about 6419.27 gross tons and 4924 net tons register, which said vessel is more fully described in her consolidated certificate of enrollment and license, a true copy of which is hereto attached and made a part hereof, together with all her engines, boilers, machinery, masts, bowsprits, boats, anchors, cables, riggings, tackle, apparel, furniture, and all other appurtenances thereunto appertaining and belonging, and any and all additions, improvements, and replacements [fol. 80] in or to the said vessel or any part or appurtenance or equipment thereof"—

To Have and to Hold, all and singular the above granted property, together with the appurtenances, and every part thereof, unto the said Trustee, its successors and assigns, Forever—

Provided, However, and these presents are upon the conditions that if the Mortgagor, its successors or assigns, shall pay or cause to be paid to said Trustee, its successors or assigns, the said principal sum of two hundred thousand dollars $200,000.00), with interest thereon at the rate of six per centum (6%) per annum, payable semi-annually, according to the tenor and effect of the bonds and coupons aforesaid; and shall keep, perform and observe all and singular the covenants and promises in said bonds and coupons and in these presents expressed to be kept, performed, and observed by or on the part of the said Mortgagor, then this Mortgage and the estate and rights hereby granted shall cease, determine, and be avoid—otherwise to remain in full force and effect.

Assumpsit

And the said Mortgagor hereby promises and agrees to pay the principal amount aforesaid, and the interest

thereon, according to the tenor and effect of the said bonds and coupons as therein stipulated, and to fulfil, perform and observe each and every one of the covenants, agreements and conditions in this mortgage and in said bonds and coupons contained.

[fol. 81] Redemption

(a) The Mortgagor, prior to the maturities of said bonds, shall have the right, at its option, on any interest date, to pay all, or any of said bonds, in their inverse numerical order, at one hundred and one-half cents (100½c) on the dollar of the principal thereof, together with interest accruing to such date of payment.

(b) In case of such redemption of bonds hereinbefore provided, the Mortgagor will give the Trustee four (4) weeks' prior written notice stating the amount of bonds to be redeemed, and, at least ten (10) days prior to the redemption date, the Mortgagor shall also deposit with the Trustee sufficient funds to pay such bonds, and interest thereon to the next ensuing interest date, and the premium aforesaid; upon making such deposit, further interest shall cease as to the bonds to be redeemed; upon receipt of such written notice and deposit, the Trustee will give notice of such redemption to the holders of the bonds to be redeemed, by a single publication at least five (5) days prior to the date of payment in a daily newspaper of general circulation in Detroit, Michigan. All expenses of redemption shall be paid the Trustee by the Mortgagor before the Trustee shall be required to act hereunder. All bonds and coupons redeemed or paid shall be canceled by the Trustee and not reissued.

Covenants and Agreements

The Mortgagor, for itself, its successors and assigns, hereby further covenants and agrees to and with the Trus-
[fol. 82] tee, its successors and assigns, as follows:

Article I

Authority to Mortgage

That the Mortgagor is a corporation duly organized and existing under and by virtue of the Laws of the State of

West Virginia and that it is duly authorized to do business in the State of Michigan; that it is duly authorized to mortgage the property conveyed hereunder; that all corporate action on its part, and all action on the part of its stockholders and directors for the making and delivery of the bonds and coupons herein mentioned, and the execution and delivery of this mortgage, have been duly and effectively taken; and that said bonds and coupons in the hands of the holders thereof, are and shall be valid and enforceable obligations of the Mortgagor in accordance with their terms.

Article II

Warranty of Title

That the Mortgagor is the sole, true and bona fide owner of the said steam screw vessel "John J. Barlum," and that it will warrant and defend the title and possession thereto, and every part and appurtenance thereof, for the benefit of the Trustee, against the claims and demands of all persons whatsoever.

[fol. 83] Article III

Insurance

(a) That the Mortgagor, at its own cost, so long as any amount hereby secured is unpaid, shall keep said vessel insured in an amount in dollars, lawful money of the United States, equal to her full insurable value but not in any case for less than one hundred and ten per centum (110%) of the amount hereby secured remaining unpaid;

(b) Such insurance shall be placed with responsible underwriters, in good standing and satisfactory to the Trustee;

(c) The policy valuation in the hull policies shall not exceed the amount insured thereby, unless with the written consent of the Trustee; all policies shall be on forms current on the Great Lakes for vessels of like class and value, or on such other forms as the Trustee may approve, insuring against all perils of the sea, and including the "Four-Fourths Running Down Clause" and "Inchmaree Clause,"

and having a deductible average not exceeding five per centum (5%) of the insured value;

(d) Such insurance shall include hull or port risk insurance and may include such an amount of disbursements and "total loss only" insurance as the policies permit;

(e) Said vessel shall also be fully covered by Protection and Indemnity insurance, in policies, and by underwriters approved by the Trustee, such protection and indemnity insurance also to protect the Trustee against any liability which the Trustee may incur;

[fol. 84] (f) When and while laid up, port risk insurance on said vessel, to like amount, and in lieu of the aforesaid hull insurance, may be taken out by the Mortgagor under the form of port risk policies current on the Great Lakes, approved by the Trustee, with underwriters as aforesaid;

(g) All insurance shall be taken in the name of the Mortgagor for account of whom it may concern. All losses shall be made payable to the Trustee, as its interest may appear; and, in the event of total loss, the Trustee will consent that the underwriters pay direct to the Mortgagor the amount by which the insurance exceeds one hundred and ten per centum (110%) of the amount then due the Trustee, upon receipt of payment of such last named amount; in the event of partial loss, if the Mortgagor be not in default hereunder, the Trustee will consent that the underwriters pay direct for repairs, salvage, and other charges, or reimburse the Mortgagor therefor, on satisfactory assurance that such payments are, or will be, made; but, if the Mortgagor be in default hereunder, the Trustee shall be entitled to collect and receive such insurance direct and to apply the proceeds in the manner provided in Article XVII hereof. All policies, certificates, binders and cover note shall be promptly delivered to the Trustee.

(h) The Mortgagor will give notice in writing to the Trustee of the due date for the payment of all premiums for hull insurance carried on said vessel, ten (10) days prior to said due dates.

[fol. 85]

Article IV

Use of Vessel

That the Mortgagor will not do or permit any act, or suffer any omission, whereby any insurance on said vessel shall or may be suspended, impaired, or defeated; and that it will cause said vessel to be used and navigated in all respects in accordance with law.

Article V

Liens

That neither the Mortgagor nor the Master of the said vessel shall have any right, power, or authority to create, incur, or permit to be placed or imposed upon the property subject or to become subject to this mortgage, any liens whatsover other than for crew's wages and salvage. The Mortgagor will carry a properly certified copy of this mortgage with the ship's papers and shall exhibit the same to any person having business with the said vessel which might give rise to any lien other than liens for crew's wages and salvage.

Article VI

Notice of Mortgage

That the Mortgagor will, in all respects, comply with the provisions of the "Ship Mortgage Act, 1920," so as to create and maintain this mortgage as a preferred mortgage upon said vessel, within the provisions of said Act and the laws of the United States, in such respect made and provided; and that the Mortgagor will also, from time to time, [fol. 86] give such notices and perform such acts as the Trustee may request, as reasonably calculated to continue and preserve such preferred status of this mortgage until it is fully paid and performed.

Article VII

Release of Attachments

That if a libel shall be filed against said vessel, or if the vessel is otherwise levied against, or taken into custody, or

sequestered, by virtue of any legal proceedings in any court, the Mortgagor shall, within fifteen (15) days thereafter, cause the said vessel to be released and the lien to be discharged.

Article VIII

Keep Vessel Repaired

That the Mortgagor will, at all times, at its own cost and expense, keep and maintain the said vessel in good, seaworthy condition and repair, and, annually, as requested, furnish the Trustee with a certificate of the American Bureau of Shipping that her class has been maintained.

Article IX

Inspection by Trustee

That the Mortgagor shall afford the Trustee or its authorized representatives, at all times, full and complete access to the said vessel, for the purpose of inspecting the same and her cargoes, equipment and papers.

[fol. 87]

Article X

Taxes, etc.

That the Mortgagor will pay and discharge, when due and payable, all taxes, assessments, civic impositions, governmental charges, fines and penalties imposed on said vessel; that it will at all times do all things necessary to preserve the lien of this mortgage as a first and prior lien upon said vessel until the full payment of all sums secured hereby; and that it will also pay the normal Federal Income Tax, not in excess of two per centum (2%) upon the interest of the bonds aforesaid.

Article XI

Trustee May Remedy Defaults

That if the Mortgagor shall make default in the performance of any of the covenants in this mortgage on its part to be performed, the Trustee may, in its discretion, do any act or make any expenditure necessary to remedy such default, including, without limitation of the foregoing, entry

upon the said vessel to make repairs, and the Mortgagor shall promptly reimburse the Trustee, with interest at the rate of six per centum (6%) per annum, for any and all expenditures so made or incurred, and until the Mortgagor has so reimbursed the Trustee for such expenditures the amount thereof shall be added to the amount of the debt secured by this mortgage, and shall be secured by this mortgage in like manner and extent as if the amount and description thereof were written herein; but the Trustee, [fol. 88] though privileged so to do, shall be under no obligation to the Mortgagor to make any such expenditures nor shall the making thereof relieve the Mortgagor of any default in that respect. The Mortgagor shall also reimburse the Trustee promptly, with interest at the rate of six per centum (6%) per annum for any and all advances and expenses made or incurred by the Trustee at any time in retaking the said vessel, or otherwise protecting its rights hereunder, and for any and all damages sustained by the Trustee from or by reason of any default or defaults of the Mortgagor.

Article XII

Possession

That the Mortgagor, until default shall have been made hereunder, may have the possession of said vessel and use and operate the same.

Article XIII

Preferred Mortgage

That the Mortgagor shall comply with and satisfy all the provisions of the "Ship Mortgage Act, 1920," and shall establish and maintain this mortgage as a first preferred mortgage under said Act.

Article XIV

Further Assurances

That in the event that this mortgage or said bonds, or any provisions thereof, be deemed invalidated in whole or [fol. 89] in part by any present or future law of the United

States, or any decisions of any authoritative court thereof, the Mortgagor shall execute such other or further instruments as in the opinion of counsel for the Trustee will carry out the true intent and spirit of this mortgage. From time to time the Mortgagor shall execute such further assurances as in the opinion of such counsel may be required to more effectually subject the property hereby mortgaged, or intended to be mortgaged, to the payment of said principal sum and the bonds and coupons aforesaid.

Article XV

Remedies on Default

The Mortgagor covenants and agrees that if default shall be made in the payment of any of the bonds or coupons aforesaid, principal or interest, or any part thereof—or if any default or breach shall be made by the Mortgagor in the observance or performance of any of its covenants or agreements herein contained, and if such default shall continue for fifteen (15) days—or if the Mortgagor be adjudged bankrupt—or if a receiver be appointed for its property—or if said vessel be sold or transferred to another flag without the written consent of the Trustee—or if said vessel shall be attached in admiralty or otherwise levied upon or sequestered by legal proceedings and not released within fifteen (15) days—or if said vessel shall be removed from the limits of the Great Lakes—or if default be made [fol. 90] by the Mortgagor resulting in any legal proceedings by the Trustee to enforce or protect any rights hereunder—then, and in each and every such event or events of default, the Trustee may declare all of the said bonds and coupons then outstanding to be immediately due and payable, anything therein to the contrary notwithstanding, and may take said vessel, without legal process, wherever the same may be, and hold, charter, operate, or otherwise use the same, for such time, and on such terms, as it may deem to the best advantage of its trust; or, at its option, in each and every such event or events of default, the Trustee may, either with or without taking actual possession of said vessel, sell the same, free from any claim, title or estate of the Mortgagor, by first giving a printed notice of such sale for ten (10) successive days in some newspaper published in

Detroit, Michigan, and by mailing a copy of such printed notice to the Mortgagor at its last known address; such sale may be held at such place and time as the Trustee may by such notices have selected and specified; and such sale may be conducted and concluded without bringing said vessel to the place of sale, and in such manner as the Trustee may deem to the best advantage of its Trust; at such sale the Trustee may become the purchaser; and the Mortgagor, for itself and for its successors and assigns, hereby makes, constitutes and appoints the said Trustee its true and lawful attorney for it, and in its name and stead, to make all necessary transfers of the vessel so sold, and for that purpose it is hereby fully authorized to make, execute and de- [fol. 91] liver, in the name of the Mortgagor, all necessary instruments of assignment and transfer, the Mortgagor hereby ratifying and confirming all that the said Trustee shall lawfully do by virtue hereof. Nevertheless the Mortgagor shall, and will, if so requested by the Trustee, ratify and confirm such sale by executing and delivering to the purchaser of said vessel such proper bill of sale or conveyance as may be designated in such request.

Article XVI

Receiver

That in case of an event of default and its continuation for the period, if any, specified in Article IV, then in each and every such case the Trustee may exercise the right of taking possession of the said vessel without legal process, and with any and all other rights, privileges, and powers granted herein and conferred; and the Trustee shall be entitled, as a matter of right, to the appointment of a receiver or receivers of the said vessel and of the earnings, income, revenue, rents, issues, or profits thereof.

Article XVII

Application of Proceeds

That the proceeds of any sale or foreclosure, the net earnings from any management, charter, or other use of the said vessel by the Trustee under any one of the powers above specified, the proceeds of any judgment collected

by the Trustee for any default hereunder, the proceeds [fol. 92] of any insurance and of any claim for damages on account of the vessel, received by the Trustee hereunder, shall be applied as follows:

1. To the payment of all expenses and charges, including the expenses of any sale, the expenses of any seizure or taking possession of said vessel, and any and all other expenses or advances made or incurred by the Trustee in the protection of its rights hereunder and to the payment of any damages sustained by the Trustee from the default or defaults of the Mortgagor, with interest as provided for herein, and to provide adequate indemnity against liens claiming priority over this mortgage.

2. To the payment pro rata of all of said bonds and coupons whether due or not due, with interest to the date of such payment.

3. Any surplus thereafter remaining shall belong and be paid or returned to the Mortgagor.

Article XVIII

Discontinuance of Proceedings

That in case the Trustee shall have proceeded to enforce any right under this indenture, by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned for any reason, or shall have been determined adversely to the Trustee, then and in every such case the Mortgagor and the Trustee shall be restored to their former positions and rights hereunder with respect to the property subject, or to become subject to this mortgage, and all rights, remedies, and powers of the Trustee [fol. 93] shall continue as if no such proceedings had been taken.

Article XIX

No Waivers

That no delay or omission of the Trustee to exercise any right or power accruing upon any default shall impair any such right or power, or shall be construed to be a waiver of any such default or acquiescence therein; and every power and remedy given by this mortgage to the Trustee

may be exercised from time to time and as often as may be deemed expedient by the Trustee.

Article XX

Discharge of Mortgage

Upon the payment of the bonds and coupons hereby secured, and the performance by the Mortgagor of all its obligations hereunder, the Trustee will discharge this mortgage according to law.

Article XXI

Successors and Assigns

All the covenants, stipulations, and agreements in this mortgage contained shall bind and enure to the benefit of the Mortgagor and Trustee, their respective successors and assigns.

Article XXII

Certificate of Enrollment and License

It is understood and agreed that Exhibit A hereto at- [fol. 94] tached, is a true and complete copy of the last Consolidated Certificate of Enrollment and License of the said steam screw vessel "John J. Barlum," and is to be taken and read for all purposes of this mortgage as completely as if the same had been inserted at length in the body hereof.

Article XXIII

Delivery of Bonds and Recognition of Bondholders

The bonds secured by this mortgage shall be certified and delivered by Trustee to the President of Mortgagor, whose receipt therefor shall be full protection to the Trustee for such certification and delivery.

The Trustee shall be under no obligation to recognize anyone as holder or owner of any of the bonds secured hereby, until he shall deposit such bonds with the Trustee and indemnify it to its satisfaction, against all expenses for which it might become liable in executing any request or demand of such person under this mortgage; if any of said

bonds or coupons shall become mutilated, destroyed or lost, the Mortgagor may issue, and thereupon the Trustee will certify and deliver new bonds or coupons of like tenor and date, and bearing the same serial number as those mutilated, destroyed or lost, provided that the applicant therefor shall furnish both the Mortgagor and the Trustee with satisfactory evidence of such mutilation, destruction or loss, and, if requested, shall also furnish them with satisfactory indemnity against the missing obligation.

[fol. 95]

Article XXIV

Temporary Promissory Note

Pending the execution, certification and issuance of the bonds secured hereby, it is contemplated that a temporary promissory note may be given said Detroit Trust Company, as trustee, by said Barlum Steamship Company, the Mortgagor, as maker, for all or any part of the bond issue hereinbefore specified; and in respect of such promissory note if, when and as given, it is agreed by and between the parties hereto that this indenture shall stand as security for the payment thereof. The Trustee shall not issue or deliver the bonds secured by this instrument when executed and certified, unless the said temporary promissory note shall be delivered to Trustee marked "Paid," and thereupon said note shall be returned to said Mortgagor by said Trustee.

Article XXV

Conditions of Acceptance of Trust

The Trustee hereby accepts the trusts created by this Mortgage, upon the following terms and conditions, to-wit:

(a) It shall incur no liability to anyone, but shall be fully protected in acting upon any notice, consent, certificate, bond or other document, believed by it to be genuine and to have been signed by the proper person;

(b) It may select and employ in and about the execution of said trusts, suitable agents and attorneys for whose acts or defaults it shall not be answerable, so long as they were selected with reasonable discretion.

[fol. 96] (c) It shall be under no obligation to perform any act hereunder, unless requested in writing so to do, and unless indemnified to its full satisfaction for so doing.

(d) It shall be no part of the duty of Trustee to file or record this mortgage, or to effect insurance hereunder; or to keep informed as to the condition of said property, but it may, in its discretion, do any or all of these matters or require the same to be done; and any and all advances made or expenses incurred by it hereunder shall constitute an additional indebtedness secured hereby, and be prior in lieu to the bonds hereunder.

The Trustee may divest itself of the trusts created by this mortgage and resign upon thirty (30) days' notice to the Mortgagor, and the due assignment and transfer of all its title and interest in the property hereby covered to its successor; upon receipt of such notice it shall be the duty of the Mortgagor to call a meeting of the bondholders by printed notice published in a public newspaper circulating in Detroit, and by mailing a copy of such notice to each known bondholder at his last known address; at the time and place specified in such notice; a majority in amount of the bondholders present or legally represented shall be competent to elect such successor, who shall thereupon be vested with all of the estate hereunder of the present Trustee; in the event of the bondholders failing to meet or act, as aforesaid, such successor may be appointed by any court in the State of Michigan exercising equity or chancery jurisdiction.

[fol. 97] Mortgagor will promptly pay to Trustee all annual and other fees agreed upon as Trustee's compensation, or if no such fees have been agreed upon, then Mortgagor will pay to Trustee when requested, such reasonable amounts as may be requested for any and all Trustee's services hereunder; all such fees shall be secured hereby.

Article XXVI

Financial Statements: Alienation

The Mortgagor will furnish Trustee from time to time, as reasonably requested, true statements of its financial condition and it will not, without the consent of the Trustee, alienate or transfer any of the property hereby covered by this mortgage.

In Witness Whereof, Barlum Steamship Company, Mortgagor, has hereunto caused its corporate seal to be affixed and this mortgage to be signed by its President and attested by its Secretary, for and in its behalf; and the said Detroit Trust Company, Trustee, to evidence its acceptance of the trust hereby created, has caused its corporate seal to be hereunto affixed and this mortgage to be signed by its Vice-President and attested by its Assistant Secretary, for and in its behalf, all as of the fifteenth day of December, A. D. 1927.

Barlum Steamship Company, by (Signed) John J. Barlum, President.

United States Internal Revenue Documentary 225075 One Hundred Dollars.

[fol. 98] Signed, sealed and delivered in presence of:
(Signed) Frank D. Eaman. (Signed) Cleveland Thurber. (Seal, Barlum Steamship Company.)
Attest:
(Signed) Thos. J. Barlum, Secretary.
Detroit Trust Company, by (Signed) H. L. Stanton, Vice-President.

Signed, sealed and delivered in presence of:
(Signed) Rilla L. Masten. (Signed) Cleveland Thurber. (Seal, Detroit Trust Company, Michigan.)
Attest:
(Signed) Nathan C. Mente, Assistant Secretary.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 4th day of January, A. D. 1928, before me appeared John J. Barlum, to me personally known, who, being duly sworn, did say that he is President of Barlum Steamship Company, a corporation incorporated under and [fol. 99] by virtue of the laws of the State of West Virginia, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said John J. Barlum acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this, the day and year first in this, my certificate, written.

(Signed) Cleveland Thurber, Notary Public, Wayne County, Mich. My commission expires October 7, 1930. (Seal.)

STATE OF WEST VA.,
County of Ohio, ss:

On this 5th day of January, A. D. 1928, before me appeared Thomas J. Barlum, to me personally known who, being duly sworn, did say that John J. Barlum and Thomas J. Barlum are the President and Secretary, respectively, of Barlum Steamship Company, a corporation incorporated under and by virtue of the laws of the State of West Virginia, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and the said Thomas J. [fol. 100] Barlum acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this, the day and year first in this, my certificate, written.

(Signed) W. C. Steber, Notary Public of, in and for Ohio County, W. Va. My commission expires November 28, 1933. (Notarial Seal.)

STATE OF MICHIGAN,
County of Wayne, ss:

On this 4th day of January, A. D. 1928, before me appeared Harry L. Stanton, to me personally known who, being duly sworn, did say that he is Vice-President of the Detroit Trust Company, a corporation incorporated under and by virtue of the laws of the State of Michigan, and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Harry L. Stanton acknowledged the said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand [fol. 101] and affixed my official seal this, the day and year first in this, my certificate, written.

(Signed) Cleveland Thurber, Notary Public, Wayne County, Mich. My commission expires October 7, 1930. (Seal.)

STATE OF WEST VA.,
County of Ohio, ss:

On this 5th day of January, A. D. 1928, before me appeared Nathan C. Mente, to me personally known, who, being duly sworn, did say that Harry L. Stanton and Nathan C. Mente are the Vice-President and Assistant Secretary, respectively, or the Detroit Trust Company, a corporation incorporated under and by virtue of the laws of the State of Michigan, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Nathan C. Mente acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this, the day and year first in this, my certificate, written.

(Signed) W. C. Steber, Notary Public of, in and for Ohio County, W. Va. My commission expires November 28, 1933. (Notarial Seal.)

[fol. 102] STATE OF WEST VA.,
County of Ohio, ss:

On this 5th day of January, A. D. 1928, before me came Thomas J. Barlum, to me known, who, being by me duly sworn, did depose and say that he resides in the City of Detroit, State of Michigan; that he is the Secretary of Barlum Steamship Company, the corporation described in and which executed the foregoing mortgage; that he knows the seal of said corporation; that the seal affixed to said instrument is the seal of said Barlum Steamship Company; that said seal was so affixed by order of the Board of Directors

of said corporation, and that he signed his name thereto by like order. And the said Thomas J. Barlum acknowledged to me that he executed said mortgage as the Secretary of the said Barlum Steamship Company; and that the same is the free and voluntary act and deed of said Barlum Steamship Company and of himself as said Secretary, for the uses and purposes therein expressed.

(Signed) W. C. Steber, Notary Public of, in and for Ohio County, W. Va. My commission expires November 28, 1933. (Notarial Seal.)

[fol. 103] STATE OF MICHIGAN,
County of Wayne, ss:

John J. Barlum, being duly sworn, deposes and says that he is the President of the Barlum Steamship Company, the corporation described in and which executed the above and foregoing mortgage; that said mortgage was so executed by said Barlum Steamship Company in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the said Barlum Steamship Company, or any lienor of the mortgaged vessel; that this affidavit was made pursuant to an order of the Board of Directors of the said Barlum Steamship Company.

(Signed) John J. Barlum.

Subscribed and sworn to before me this 6th day of January, A. D. 1928. (Signed) Cleveland Thurber, Notary Public, Wayne County, Michigan. My commission expires October 7, 1930.

We, the undersigned, John J. Barlum and Thomas J. Barlum, being respectively the President and Secretary of Barlum Steamship Company, hereby certify and acknowledge that at a meeting of the stockholders of said Barlum Steamship Company, held at 2104 Penobscot Building, Detroit, Wayne County, Michigan, on the 4th day of Jan-
[fol. 104] uary, A. D. 1928, called for the purpose and upon the notice required by law, more than two-thirds (2/3) of the stockholders of the company consented to the execution of a mortgage upon the property of the company, to be dated December 15, 1927, and to secure two hundred thousand dollars ($200,000.00) of bonds of said Barlum

Steamship Company, and the interest thereon, said mortgage being the foregoing mortgage, executed by said Barlum Steamship Company to Detroit Trust Company, as Trustee.

In Witness Whereof, we have hereunto subscribed our names as President and Secretary, respectively, of said Barlum Steamship Company, and have caused the seal of said corporation to be hereunto affixed.

(Signed) John J. Barlum, President. (Signed) Thos. J. Barlum, Secretary. (Corporate Seal.)

STATE OF MICHIGAN,
County of Wayne, ss:

On this 4th day of January, A. D. 1928, before me, a notary public in and for said county, personally appeared John J. Barlum, known to me to be the President of Barlum Steamship Company and to be the same person who subscribed the foregoing certificate, who acknowledged that [fol. 105] he subscribed the same as such President and that the same is his free act and deed.

(Signed) Cleveland Thurber, Notary Public, Wayne County, Mich. My commission expires October 7, 1930. (Notarial Seal.)

STATE OF WEST VA.,
County of Ohio, ss:

On this 5th day of January, A. D. 1928, before me, a notary public in and for said county and state, personally appeared Thomas J. Barlum, known to me to be the Secretary of Barlum Steamship Company, and to be the same person who subscribed the foregoing certificate, who acknowledged that Thomas J. Barlum subscribed the same as Secretary, and that the same is their free act and deed.

(Signed) W. C. Steber, Notary Public of, in and for Ohio County, W. Va. My commission expires November 28, 1933. (Notarial Seal.)

[fol. 106] I, Thomas J. Barlum, of Detroit, Michigan, swear that I am Secretary of the Barlum Steamship Company, a corporation organized under the laws of the State of West Virginia; that said corporation is the owner of the

vessel called "John J. Barlum," of Detroit, official number 206279, gross 6419.47, net 4924, built in 1909, at Lorain, Ohio, as appears by P. E. No. 17, issued at Detroit, February 18, 1919, now surrendered, corporation officer changed; that I am a citizen of the United States of America; that the President and managing directors of said corporation are citizens of the United States of America; that seventy-five per centum (75%) of the interest in said corporation is owned by citizens of the United States of America; that the title to seventy-five per centum (75%) of the stock of said corporation is vested in citizens of the United States of America free from any trust or fiduciary obligation in favor of any person not a citizen of the United States of America, and that such proportion of the voting power of said corporation is vested in citizens of the United States; that through no contract or understanding is it so arranged that more than twenty-five per centum (25%) of the voting power of said corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States of America; that by no means whatsoever is the control of any interest in said corporation in excess of twenty-five per centum (25%) conferred upon or permitted to be exercised by any person who is not a citizen of the United States of America; that A. J. [fol. 107] Mahon, the present master of said vessel, is also a citizen of the United States of America, having been born in Canada, and naturalized in Detroit Circuit Court December 11, 1889.

(Signed) Thos. J. Barlum.

Subscribed and sworn to before me this 6th day of January, 1928. (Signed) F. J. Heffner, Deputy Collector of Customs, Notary Public, Wayne County, Mich. My commission expires ——.

District of Michigan,
Port of Detroit, Seal:

I, Harry L. Stanton, of Detroit, Michigan, swear that I am a Vice-President of the Detroit Trust Company, a corporation organized under the Laws of the State of Michigan, with offices at Detroit, Michigan; that said corporation is the mortgagee of the vessel called "John J. Barlum," of Detroit, official number 206279, gross 6419.47, net

4924, built in 1909, at Lorain, Ohio, as appears by P. E. No. 17, issued at Detroit, February 18, 1919, now surrendered, corporation officer changed; that I am a citizen of the United States of America; that the president and managing directors of said corporation are citizens of the United States of America; that seventy-five per centum (75%) of the interest in said corporation is owned by citizens of the United States of America; that the title to [fol. 108] seventy-five per centum (75%) of the stock of said corporation is vested in citizens of the United States of America free from any trust or fiduciary obligation in favor of any person not a citizen of the United States of America, and that such proportion of the voting power of said corporation is vested in citizens of the United States; that through no contract or understanding is it so arranged that more than twenty-five per centum (25%) of the voting power of said corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States of America; that by no means whatsoever is the control of any interest in said corporation in excess of twenty-five per centum (25%) conferred upon or permitted to be exercised by any person who is not a citizen of the United States of America; that A. J. Mahon, the present master of said vessel, is also a citizen of the United States of America, having been born in Canada, and naturalized in Detroit Circuit Court, December 11, 1889.

(Signed) Harry L. Stanton.

Subscribed and sworn to before me this 6th day of January, 1928. (Signed) F. J. Heffner, Deputy Collector of Customs, Notary Public, Wayne County, Mich. My commission expires ——.

District of Michigan,
Port of Detroit, Seal:

[fol. 109] Cat. No. 1273

The United States of America:

Department of Commerce, Bureau of Navigation

Permanent or temporary: Permanent.
Certificate No. 12.
Official No.: 206279.

Letters: ——.
Measured at: Lorain, Ohio, 1909.
Rebuilt at: ——, 19—.
Remeasured at: ——, 19—.
Radio call: Coal Burner.
Service: Freight.
Number of Crew, excluding Master: 19.
Horsepower: 1760.

Consolidated Certificate of Enrollment and License

(Northern, Northeastern, and Northwestern Frontiers of the United States, Otherwise Than By Sea)

(Sections 4319 and 4321, Rev. Stats., and Act of April 24, 1906, as Amended by Act of February 29, 1912)

In Conformity to Title L, "Regulation of Vessels in Domestic Commerce," of the Revised Statutes of the United States

Thomas J. Barlum, of Detroit, Mich., having taken and [fol. 110] subscribed the oath required by law, and having sworn that he is a citizen of the United States and Secretary of the Barlum Steamship Company, a body corporate under the laws of the State of West Virginia with principal office at Detroit, Mich.; that the said company is a citizen of the United States as defined in Section 38, Merchant Marine Act, 1920, for operating vessels in the coastwise trade.

Custom House, Port of Detroit, Mich., Dec. 20, 1927.
Certified to be a true copy from the records of this office.
(Sgd.) F. J. Heffner, Deputy Collector of Customs.

and the sole owner of the vessel called the John J. Barlum, of Detroit, and that the said vessel was built in the year 1909, at Lorain, Ohio, of steel as appears by P. E. No. 17 issued at Detroit Feb. 18, 1919, now surrendered, corporation officer changed, and said enrollment having certified that the said vessel is a steam screw; that she has one deck, two masts, a plain head, and a round stern; that her register length is 504.0 feet, her register breadth 54.0 feet, her register depth 30.0 feet, her height, — feet; that she measures as follows:

	Tons	100ths
Capacity under tonnage deck	6156	54
Capacity between decks above tonnage deck		
Capacity of inclosures on the upper deck, viz.: Forecastle, 95.54; bridge, —; poop, —; [fol. 111] break, —; houses—round, 145.79, side, —, chart, —, radio, —; excess hatchways, —; light and air, —	262	93
Coal bunker on deck 21.60.		
Gross tonnage	6419	47

Deductions under Section 4153, Revised Statutes, as amended:

Crew space, 109.12; Master's cabin, 14.32; Steering gear, 33.61; Anchor gear, 35.88; Boatswain's store, 78.40; Chart house, 11.45; Donkey engine and boiler, —; Radio house, —; Storage of sails, 55.24; Propelling power (actual space —), 1116.41; Dining R., Kitchen, Hallways, etc., 41.24.		
Total deductions	1495	67
Net tonnage	4924	

License

And A. J. Mahon, the master, having sworn that he is a citizen of the United States, that this license shall not be used for any other vessel, or for any other employment than is herein specified, or in any trade or business whereby the revenue of the United States may be defrauded:

License is hereby granted for the said vessel to be em- [fol. 112] ployed in carrying on the Coasting and Foreign Trade for One Year from the date hereof, and no longer.

Given under my hand and seal at the Port of Detroit, District of Mich., No. 38, this 15th day of March, in the year One Thousand Nine Hundred and Twenty-seven.

(Sgd.) C. E. Scheffler, Deputy Collector of Customs.
(Seal.)

No. —.
Comptroller of Customs.

[fol. 113] Cat. No. 1273

Department of Commerce, Bureau of Navigation

Permanent

(Permanent or Temporary)

Frontier

Consolidated Enrollment and License for the Coasting and Foreign Trade, No. 12, of the Steam Screw Called the John J. Barlum of Detroit, 6419 Gross, 4924 Net, Issued at the Port of Detroit, March 15, 1927

[fol. 114] Preferred Mortgage Indorsement of Vessel of 200 Gross Tons and Over. (Merchant Marine Act, 1920, Sec. 30)

Mortgage Description

(Subsection DC)

Mortgagor: ——.
Mortgagee: ——.
Indorsed: ——, 19—, at — m.
Total amount: $—.
Date of maturity: ——, 19—.
Discharge amount: $—.
Port of: ——.

—— ——, Collector of Customs. (Seal.)

Office of the Collector of Customs, Port of Detroit, Michigan

January 6th, 1928.

Received for Record at 11:30 a. m.
Recorded in Book "V" of Mortgages, page 53.
Indorsed on vessel's Marine Document, January 6th, 1928, at 4:20 p. m.

(Sgd.) F. J. Heffner, Deputy Collector of Customs.
(Seal.)

(Here follows Exhibit B, side folio 114a)

[fol. 114-a]

Cat. No. 1331
Arts. 61, 62 and 63, Customs Regulations, 1923

Abstract and Certificate of Record of Title of t

Grantor	Grantee	Kind of conveya
	Vessel arrived under P. E. No. 35, issued at Cleveland, February 18, 1919, account property and district change	
Postal Steamship Company	Barlum Steamship Company	Bill of Sale
Barlum Steamship Company	Detroit Trust Company, Trustee	Preferred Mortgage

NOTE: This certific

I Hereby Certify that the foregoing is a true Abstract of Convey Customhouse, Detroit, Michigan. February 16, 1931, 12:30 P. M.

(On reverse side:)

Department of Commerce,

Bureau of Navigation

Name of owners and amounts owned, as shown by Marine Document P. E. No. 12, issued at Detroit, Michigan, on March 15, 1927:

Barlum Steamship Company of Detroit, Michigan, sole owner.

Cat. No. 1331

Department of Commerce,

Bureau of Navigation

Office of Collector of Customs, Port of Detroit, Michigan

——, 192—.

Abstract and Certificate of Record of Title of the Steam Screw John J. Barlum (206279), Detroit, Michigan.

EXHIBIT B TO LIBEL

No. 1331
Customs Regulations, 1923

Abstract and Certificate of Record of Title of the Steam Screw Called the John J. Barlum (206279) of Detroit, Michigan, as Provided for by R.

	Grantee	Kind of conveyance	Date of conveyance Month	Day	Year	Consideration Dollars Cts.	Received for record Month	Day	Year	Hour Minute	Book of record Bill of sale	Mortgage	Page	
	Vessel arrived under P. E. No. 35, issued at Cleveland, Ohio, February 7, 1917, which document was surrendered at Detroit, Michigan, February 18, 1919, account property and district changed.													
pany	Barlum Steamship Company	Bill of Sale	Jan.	17	1919	1.00	Feb.	18	1919	10:30 A. M.	"6"		25	
mpany	Detroit Trust Company, Trustee	Preferred Mortgage	Dec.	15	1927	$200,000.00	Jan.	6	1928	11:30 A. M.		"V"	53	

NOTE: This certificate is issued under Subsection I (1), Section 30, Merchant Marine Act, 1920, and further title instruments, if tendered for recor

rtify that the foregoing is a true Abstract of Conveyances of the Steam Screw called the John J. Barlum, now of Detroit, Michigan, as appears by th
e, Detroit, Michigan. February 16, 1931, 12:30 P. M.

(On reverse side:)

Department of Commerce,

Bureau of Navigation

rs and amounts owned, as shown by Marine
No. 12, issued at Detroit, Michigan, on

ship Company of Detroit, Michigan, sole

Cat. No. 1331

Department of Commerce,

Bureau of Navigation

or of Customs, Port of Detroit, Michigan

——, 192—.

Certificate of Record of Title of the Steam
rlum (206279), Detroit, Michigan.

EXHIBIT B TO LIBEL

ohn J. Barlum (206279) of Detroit, Michigan, as Provided for by R. S. 4194, Section 1, Act June 19, 1886, and T. D. 22878.

Consideration	Received for record				Book of record			Part conveyed	Amount of maturity	Date of maturity			Date of indorsement on marine document				Port where indorsed
Dollars Cts.	Month	Day	Year	Hour Minute	Bill of sale	Mortgage	Page		Dollars Cts	Year	Month	Day	Year	Month	Day	Hr. Min.	
nent was surrendered at Detroit, Michigan,																	
1.00	Feb.	18	1919	10:30 A. M.	"6"		25	All									
$200,000.00	Jan.	6	1928	11:30 A. M.		"V"	53	All	$200,000.00 with interest at 6% per annum	1935	Dec.	15	1928	Jan.	6	4:25 P. M.	(Recorded)
													1928	Jan.	6	4:20 P. M.	Detroit

ction 30, Merchant Marine Act, 1920, and further title instruments, if tendered for recording, will be recorded in this office.

led the John J. Barlum, now of Detroit, Michigan, as appears by the Index of Conveyances and Records in this Office.

F. J. Heffner, Acting Deputy Collector of Customs. (Seal.)

[fol. 115] EXHIBIT C TO LIBEL

Barlum Steamship Company, Detroit, Michigan.

GENTLEMEN: Please take notice that the Preferred Mortgage of the Steamer "John J. Barlum" made by you as Mortgagor to Detroit Trust Company as Trustee, on December 15, 1927, recorded on January 6, 1928, in Book "V" of Mortgages, page 53, Office of the Collector of Customs, Port of Detroit, Michigan, is in default, and has been in default since December 15, 1930, on account of your failure to pay when due, on December 15, 1930, fifty thousand dollars ($50,000.00) of principal of said mortgage, consisting of Bonds numbered one (1) to fifty (50), inclusive.

The undersigned, on behalf of the bondholders, hereby declares the entire amount of said mortgage immediately due and payable, pursuant to Article XV of said Mortgage, the said default having continued for more than fifteen (15) days.

The undersigned, on behalf of the bondholders, hereby demands payment by you of the entire amount of said mortgage, to-wit, the sum of two hundred thousand dollars ($200,000.00), with interest thereon in addition at the rate of six per centum (6%) per annum from December 15, 1930, to date of payment.

Detroit Trust Company, Trustee, by (Sgd.) A. W. Massnick, Trust Officer.

Dated at Detroit, Michigan, April 22, 1931.

[fol. 116] IN UNITED STATES DISTRICT COURT

RECITAL AS TO ORDERS DIRECTING SERVICE OF NOTICE OF COMMENCEMENT OF SUIT

On May 18, 1931, there was duly granted by Hon. Simon L. Adler, District Judge, and duly entered, an order, in each of the suits, complying with the provisions thereto relating contained in Section 951, Title 46, U. S. C. A., directing the manner of service on the caretaker of the vessel of the notice of commencement of the suit, required, by said Section. Said notices were duly served as required by said section but the orders and the notices are omitted from this record, by stipulation.

[fol. 117] IN UNITED STATES DISTRICT COURT

CLAIM OF OWNERSHIP OF BARLUM STEAMSHIP COMPANY, SUIT No. 1794

To the Honorable Judges of the District Court of the United States For the Western District of New York, In Admiralty:

Now comes Barlum Steamship Company, a West Virginia corporation, and alleges that it is the sole owner of the Steamer Thomas Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances, and claims the said Steamer Thomas Barlum and property and prays that the same may be delivered to it, said Barlum Steamship Company.

Barlum Steamship Company, by (Sgd.) John J. Barlum, Its President.

(Verified by John J. Barlum.)

[fol. 118] IN UNITED STATES DISTRICT COURT

CLAIM OF OWNERSHIP OF BARLUM STEAMSHIP COMPANY, SUIT No. 1795

To the Honorable Judges of the District Court of the United States For the Western District of New York, In Admiralty:

Now comes Barlum Steamship Company, a West Virginia corporation, and alleges that it is the sole owner of the Steamer John J. Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances and claims the said Steamer John J. Barlum and property and prays that the same may be delivered to it, said Barlum Steamship Company.

Barlum Steamship Company, by John J. Barlum, Its President.

(Verified by John J. Barlum.)

[fol. 119] IN UNITED STATES DISTRICT COURT

AMENDED EXCEPTIONS OF CLAIMANT TO LIBEL, SUIT NO. 1794

Barlum Steamship Company, claimant herein, amending its exceptions to the libel heretofore filed herein, now excepts to the libel on the following grounds:

1. That the facts alleged in the libel do not constitute a cause of action within the admiralty and maritime jurisdiction of this Honorable Court.

2. That the facts alleged in the libel do not give rise to any maritime lien upon the Steamer Thomas Barlum.

3. That Subsection K of the "Ship Mortgage Act, 1920" (Sec. 951, Title 46, U. S. C.), insofar as it purports to permit the enforcement of the lien of the preferred mortgage upon the Steamer Thomas Barlum by Detroit Trust Company, as Trustee, mortgagee, by suit in rem in admiralty and to grant original jurisdiction of such suit to the district court of the United States, is violative, and in contravention, of Article III, Section 2, of the Constitution of the United States extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction, and is null, void and of no effect.

Dated, this 9th day of July, 1931.

George E. Brand, Proctor for Claimant, 3709-15 Barlum Tower, Detroit, Michigan. Thomas C. Burke and Charles S. Desmond, Advocates.

(Exceptions in identical form were filed as to Libel No. 1795.)

[fol. 120] IN UNITED STATES DISTRICT COURT

OPINION RE CLAIMANT'S EXCEPTIONS IN SUITS NOS. 1794 AND 1795

ADLER, District Judge:

Libels were filed herein for the foreclosure of two preferred mortgages on the Steamers "Thomas Barlum" and "John J. Barlum." Exceptions to the libels are filed by Barlum Steamship Company claimant of both steamers.

The principal ground of the exceptions is that the statute under which the libels are brought is null, void and of no effect and violative of the United States Constitution.

The foreclosures herein are being prosecuted as authorized by the Ship Mortgage Act, Title 46, Section 951, U. S. C. A. The question presented to the Court is the constitutionality of that Act.

After consideration of the arguments of counsel and a study of the authorities cited in their briefs, I have decided to adopt the reasoning and conclusion of Judge Partridge in "The Nanking," 292 Fed. 642. It seems to me that the power of Congress under the Constitution to assign to the courts certain duties under the head of Admiralty and Maritime Jurisdiction, is not less than the power of Parliament under the English Constitution. Some years ago Parliament provided for the administration in admiralty of transactions relative to mortgage loans. In the cases in which the constitutionality of the foreclosure provisions of the Ship Mortgage Act have been considered, the District Courts have determined in favor of their constitutionality. While this Court is not bound by those decisions, I believe [fol. 121] that the reasoning in the "Nanking" is sound. The right to foreclose in admiralty, given by this statute, does not it seems to me come within the prohibition against the broadening or enlarging of admiralty and maritime jurisdiction as granted to the court by the Constitution. It is rather a procedural method for the Court to apply in determining equitable relief. The Admiralty Courts have always administered funds which were the proceeds of mortgages. The Congress by providing for the foreclosure of a preferred mortgage on a ship, which is itself a maritime thing, by that statute simply designates the procedure by which the fund is created.

I am convinced that the statute is constitutional and the exceptions to the libels are therefore not sustained.

Dated, February 17th, 1932.

Simon L. Adler, U. S. D. J.

[fol. 122] IN UNITED STATES DISTRICT COURT

ORDER ENTERED FEBRUARY 23, 1932, OVERRULING CLAIMANT'S EXCEPTIONS IN SUIT NO. 1794

Barlum Steamship Company, a West Virginia corporation, having filed its claim herein on the return day of process issued upon the libel herein, and said return day having been thereafter adjourned from time to time to the 6th day of July, 1931, said claimant having sought leave of the Court to file exceptions to said libel, and objections thereto having been made and the matter having come on to be heard before the Court, and an order having thereupon been made permitting the filing of such exceptions on behalf of the claimant upon condition that the argument of said exceptions be brought on to be heard before Hon. Simon L. Adler, one of the District Judges of said Court, not later than the 11th day of July, 1931, and Vacuum Oil Company, an intervener herein, having filed further exceptions to said libel, and said claimant having filed amended exceptions to said libel, and the argument of said exceptions having been brought on to be heard by notice thereof before Hon. Simon L. Adler, one of the District Judges of said Court, at his chambers in the Federal Building, in the City of Rochester, New York, on the 10th day of July, 1931, and having been duly argued and submitted by Ray M. Stanley, Esq., of counsel for libelant, and by Charles S. Desmond, Esq., of counsel for claimant; and Frederick L. Leckie, Esq., of counsel for various maritime lienors, having appeared thereon and having been heard on behalf of said exceptions.

Now, on reading and filing said exceptions to said libel [fol. 123] and due deliberation having been had thereon, and the Court having rendered its decision and opinion in writing, dated the 17th day of February, 1932, overruling said exceptions to the libel,

Now, On Motion of Stanley & Gidley, proctors for the respondent, it is

Ordered, Adjudged and Decreed that the exceptions heretofore filed by the claimant herein, together with the amended exceptions similarly filed by the claimant herein, together with the exceptions to said libel filed by Vacuum Oil Company, intervener herein, be and the same hereby are overruled; and it is hereby further

Ordered, Adjudged and Decreed that the claimant herein have ten (10) days from the date of this order in which to file and serve answers to the libel herein.

Simon L. Adler, U. S. D. J.

(Order in identical form was entered February 23, 1932, overruling claimant's exceptions in Suit No. 1795.)

[fol. 124] In United States District Court

Answer, Suit No. 1794

Barlum Steamship Company, claimant above named, by George E. Brand and Burke & Desmond, its proctors, for its answer herein, admits that the allegations of the libel are true;

And for a separate defense alleges:

First: That the indebtedness of the Barlum Steamship Company to libelant in the sum of $200,000.00 and for the purpose of securing the payment of which and interest thereon, as evidenced by bonds aggregating that amount, and the coupons attached thereto, said Barlum Steamship Company executed and delivered to libelant a mortgage on the whole of said Steamer Thomas Barlum, as set forth in paragraph 3 of the libel herein, arose out of the loan of moneys to said Barlum Steamship Company in the said sum of $200,000.00, and that said moneys were used by said Barlum Steamship Company almost entirely for nonmaritime purposes, to-wit: for loans made by said Barlum Steamship Company to other corporations and associations to enable them, said corporations and associations, to pay their bank and other indebtedness and the cost of construction of certain buildings on real property, in none of which corporations, associations, bank or other indebtedness, buildings or property, did said Barlum Steamship Company have, nor has it now, any interest; all of which was well known to libelant when said mortgage was negotiated, executed and delivered.

And for a second separate defense, alleges:

Second: That the facts alleged in the libel do not con-
[fol. 125] stitute a cause of action within the admiralty and

maritime jurisdiction of this Honorable Court, in that said facts did not give rise to any maritime lien upon the Steamer Thomas Barlum, and in that the so-called "Ship Mortgage Act, 1920" referred to in the libel, insofar as it purports to permit the enforcement of the lien of the mortgage on the Steamer Thomas Barlum referred to in the libel, by suit in rem in admiralty, and to grant original jurisdiction of such suit to the District Court of the United States is violative of, and in contravention of, Article III, Section 2 of the Constitution of the United States, and is null, void and of no effect.

Wherefore, claimant prays for a decree dismissing the libel, with costs.

Barlum Steamship Company, Claimant, by John J. Barlum, President. George E. Brand, 3709-15 Barlum Tower, Detroit, Michigan, and Burke & Desmond, 1031 Marine Trust Bldg., Buffalo, New York, Proctors for Claimants.

(Verified by John J. Barlum.)

(Answer in identical form was filed in Suit No. 1795.)

[fol. 126] IN UNITED STATES DISTRICT COURT

EXCEPTIONS OF LIBELANT TO ANSWER, SUIT NO. 1794

The libelant hereby excepts to the answer of Barlum Steamship Company, claimant herein, as follows:

First: That the answer admits that all of the allegations of the libel are true.

Second: That the first separate defense contained in the answer herein is insufficient in law upon the face thereof and is irrelevant and incompetent.

Third: That it appears upon the face of the libel herein that the libelant was at all times in said libel mentioned and is now, acting in a representative capacity and that, therefore, the matters and things alleged in the first, separate defense contained in said answer are insufficient in law to constitute a defense.

Fourth: That the matters and things set up in the second, separate defense contained in the answer herein, were heretofore pleaded and raised by the claimant herein upon exceptions and amended exceptions to the libel herein, and have been heretofore duly considered and decided by this Court adversely to said claimant and that an order to such effect overruling said exceptions and amended exceptions to said libel has been heretofore granted by this Court and entered herein in the above entitled action.

Wherefore, libelant prays for a decree of this Court overruling and setting aside the said answer of claimant herein and decreeing that libelant recover herein in accordance [fol. 127] with the provisions of said libel and the prayer for relief therein contained, together with costs.

Detroit Trust Company, Formerly Detroit & Security Trust Company, a Michigan Corporation, Trustee, by Ellis H. Gidley, One of Its Proctors. Stanley & Gidley, Proctors for Libelant, 1042 Marine Trust Bldg., Buffalo, N. Y.

(Exceptions in identical form were filed by libelant in Suit No. 1795.)

[fol. 128] IN UNITED STATES DISTRICT COURT

OPINION RE EXCEPTIONS TO ANSWERS IN SUITS NOS. 1794 AND 1795

ADLER, District Judge:

Exceptions have been filed to the answers in these two cases. The answers contain two separate defenses. The second of the two separate defenses has been disposed of by a prior decision made by me in these cases.

The question to be determined here is upon the exceptions to the first of the defenses. I hereby overrule the exceptions with respect to the matter set up in the first defense in each of the cases. In view of the circumstances and conditions that have been disclosed to me and which have arisen out of the beginning of these actions, I think it desirable and in the interests of justice that an early trial of the cases be had. I therefore suggest to counsel that

they consult with me with a view to fixing a date for the trial to be held within the next few weeks.

Dated May 27th, 1932.

Simon L. Adler, U. S. D. J.

[fol. 129] IN UNITED STATES DISTRICT COURT

ORDER ENTERED JUNE 7, 1932, RE LIBELANT'S EXCEPTIONS TO ANSWER, SUIT NO. 1794

Libelant above named, having excepted to the first and second alleged separate defenses in the answer of claimant on various grounds, and said exceptions having duly come on to be heard, and having been argued, and due deliberation having been had, and the Court having rendered its opinion in writing dated the 27th day of May, 1932, overruling the exceptions as to the first separate defense and sustaining the exceptions as to the second separate defense.

Now, on motion of George E. Brand and Burke & Desmond, proctors for claimant,

It Is Ordered, Adjudged and Decreed, that libelant's said exceptions to the first alleged separate defense in said answer be, and they hereby, are in all respects overruled,

And on motion of Stanley & Gidley, proctors for libelant,

It Is Ordered, Adjudged and Decreed, that libelant's said exceptions to the second alleged separate defense in said answer be, and they hereby are, in all respects sustained.

Simon L. Adler, U. S. D. J.

(Order in identical form was entered June 7, 1932, in Suit No. 1795.)

[fol. 130] IN UNITED STATES DISTRICT COURT

RECITAL AS TO INTERVENING LIBEL OF SEAMEN

In the suit against the Steamer John J. Barlum certain seamen, on March 8, 1932, petitioned for and were granted leave to intervene, and filed their libel, for wages due them; no answer was filed to this libel and the Court duly found that these intervening libelants were entitled to recover

against the Steamer, in the suit, the amounts claimed, with interest, all as provided for in the final decree herein, as follows: William W. Parry, $604.20; William C. Houston, $1350.98; Andrew R. Brabaw, $462.80; and J. H. Young, $473.93. The petition to intervene, order permitting intervention and intervening libel, of these seamen, are, by stipulation, omitted from this record.

[fol. 131] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

In Admiralty

No. 1794

No. 1795

[Titles omitted]

Statement of Evidence

(The testimony of witnesses Lawrence K. Butler, Ruth [fol. 132] Alleman, John J. Barlum and Fred Van Zandt was taken in both causes Nos. 1794 and 1795, at Detroit, Michigan, June 28, 1932, before a notary public and pursuant to a stipulation that such testimony be deemed taken in each of said causes to the extent that such testimony is relevant and/or applicable therein and that same may be used in the respective causes as if the relevant testimony had been separately taken. Such testimony follows):

LAWRENCE K. BUTLER, being by said Orrin C. Jones, notary public, first duly cautioned and sworn to testify the whole truth, deposed and said as follows:

Direct examination.

By Mr. Brand:

Q. Your full name is Lawrence K. Butler?

A. Yes, sir.

Q. Mr. Butler, what is your present connection with the Detroit Trust Company?

A. One of the vice-presidents of the Detroit Trust Company.

Q. How long have you been connected with that company?

A. Thirty-one years.

Q. You were a vice-president in 1924, in December of 1924?

A. Yes, sir.

Q. And, as vice-president, what did you have to do with the making of loans to the Barlum Steamship Company? Was that in your department?

A. Yes, sir.

Q. You knew Mr. John J. Barlum?

A. Yes, sir.

[fol. 133] Q. You had done business, or your company had done business with him before the first loan was made in December, 1924, on the Thomas Barlum?

A. I don't remember the date at which I first knew Mr. Barlum in a business way. I don't remember.

Q. Mr. Barlum was connected with several different enterprises, was he not?

A. Yes, sir.

Q. Among them being the Barlum Land & Improvement Company?

A. Yes.

Q. Thomas Barlum & Sons?

A. Yes.

Q. Barlum Realty Company?

A. Yes.

Q. Barlum Steamship Company?

A. Yes.

Q. Cadillac Square and Improvement Company?

A. Yes.

Q. He also did business individually with your company, did he not?

A. Yes, sir.

Q. As of December 1, 1924, the Detroit Trust Company made a loan, did it not, to the Barlum Steamship Company of $100,000 secured by mortgage on the Thomas Barlum?

Mr. Stanley: I think for the purpose of saving time I will make a general objection that will cover the entire line of examination. It is our understanding that the depositions being taken today are for the purpose of offering proof, suggested by the first affirmative defense, contained in the answers in both cases.

We object to the testimony now being offered on the ground that it is improper, irrelevant, immaterial and inadmissible;

Upon the further ground that the libellants allege and [fol. 134] the answers admit that all things necessary to be done under the Merchant Marine Act of 1920, in order to give each of said mortgages the status of preferred mortgages, have been duly performed; that the Ship Mortgage Act of 1920 contains no provision covering the use of the proceeds of a loan secured by a preferred mortgage given under the Act, and nowhere specifies that such proceeds shall be used for the purposes of the vessel mortgaged;

And further upon the ground that the validity and constitutionality of the Ship Mortgage Act has already been determined by the court in these cases and has become the law of the cases for all purposes.

That objection I make to cover all questions that are going to be asked of witnesses bearing upon this defense, for the purpose of saving the necessity of repeating objections to particular questions, so that I intend that the objection shall be general and to apply to each and all questions covering the affirmative defense mentioned.

Mr. Brand: Let the record show that the testimony is offered in support of all of the defenses raised in the answer, and not limited.

Mr. Stanley: Then I will add, if it is offered in support of the second affirmative defense set up in the answer, I object to it on the same grounds as I have already stated.

[fol. 135] A. As I remember it, it did, yes.

By Mr. Brand:

Q. I show you Exhibit 1 and ask you whether that is not a letter written by you to John J. Barlum as president of the Barlum Steamship Company, on December 22, 1924, in connection with such loan?

A. Yes. sir.

Mr. Brand: I offer Exhibit 1 in evidence and will ask the notary to mark two copies as exhibits, also to be attached.

(The document was marked Exhibit 1.)

Q. I show you Exhibit 2, being on the form of an application to the Securities Commission, dated December 23, 1924,

and ask you whether or not that is not a certified photostatic copy of an application that was made to the Michigan Securities Commission in connection with the loan referred to in Exhibit 1?

A. There is nothing on it to show that I ever saw it before.

Mr. Brand: Will you concede, Mr. Thurber, that it came from your office? Your firm handled it. Your name appears thereon.

Mr. Thurber: No, we didn't handle it.

Mr. Brand: Well, have you any objection? It is certified to by the Michigan Securities Commission. Mr. Barlum will also later identify his signature.

A. It undoubtedly is a photostatic copy of an application with the Securities Commission, but whether we filed it or not, I don't know.

[fol. 136] Mr. Brand: Will it be conceded that that is a photostatic copy of the application, in connection with the application of that issue. Mr. Barlum will supplement it by proving his signature.

Mr. Stanley: My impression about that is this: We object to the competency and relevancy of it. We accept your statement that it is, and have it marked in evidence over our objection without any further comment on it.

Mr. Brand: Over your objection as to competency, relevancy and so forth.

Mr. Stanley: Yes.

Mr. Brand: All right. I offer in evidence Exhibit 2, the application referred to, consisting of three sheets of application proper, with one exhibit, a financial statement, attached, dated December 16th, 1924. No copy of this exhibit need be attached, but the original may be produced at any time.

(The document was marked Exhibit 2.)

Q. Mr. Butler, in this Exhibit 2, in Paragraph 13, it says this, "For what purposes are the bonds to be sold?" And, it has typewritten in, "Settlement of tax claims with the United States Government based on questions of depreciation and invested capital." Was that true?

Mr. Stanley: I object to the question. The document speaks for itself.

[fol. 137] By Mr. Brand:

Q. Was that true, Mr. Butler?

A. I don't know.

Q. Did you not handle the making of this loan with Mr. Barlum?

A. Yes, sir.

Q. You say you don't know whether that is true or not?

A. I don't remember.

Q. Will you ask to have your file sent over on this loan, and the following refinancing of $75,000, in November of 1927, so that we can see whether there isn't anything in your file to refresh your recollection, if I get your office?

A. I don't know what to ask for to send over, Mr. Brand, whether you want the loan record sheets or what.

Q. I want the file. You have a bond issue pouch with papers in it, and undoubtedly it is there?

A. I am afraid if there is anything there it would simply be in the correspondence.

Q. Yes. You will find a copy of this application, undoubtedly, in the file. We have to have the facts.

Mr. Stanley: As a matter of fact, there is no reference to any prior mortgages contained in this list.

Mr. Brand: I am entitled to have the records produced even now.

Mr. Stanley: Of course, I am not disputing that, except you didn't give us any notice.

Mr. Thurber: We did not anticipate, Mr. Brand, that you would require anything on mortgages preceding the mortgages in question other than what is contained in the [fol. 138] papers we have present here. I thought, perhaps, after examining those you would save what you are doing now.

Mr. Brand: It would only take a minute to get the pouch over here. It is a bond issue pouch you have.

A. I am very much afraid it would take longer, Mr. Brand. I don't know where to look for it back in 1924. Those files were all transferred, and I am very much afraid it would take longer than that. I will be perfectly glad to get them over here, though.

Mr. Brand: Well, we have to get a start here somewhere.

Mr. Thurber: Mr. Brand, perhaps if you would state

what you desire to show by these papers, it may be that we can agree that the papers do show that and save you the necessity of even putting it in; I mean, I would like to simplify it.

Br. Brand: What I want to show is that it was stated to the Detroit Trust Company by Mr. Barlum that he wanted to make this loan of $100,000 on the Thomas Barlum for the purpose as stated.

Mr. Thurber: For the purpose of paying certain taxes?

Mr. Brand: Yes. That is what the application stated. I don't see how you can controvert it, because that was the fact, and the bulk of the money was used for that purpose.

Mr. Thurber: Well, now, if we have an opportunity to check up on those files, and those files show that, we will [fol. 139] produce perhaps one paper that will prove what you wish without your having to wade through a lot of files we don't know anything about. But, we will try and pick out exactly the information you want. That is the information you want to show.

Mr. Brand: Yes. I want to know from Mr. Butler whether that statement was not true.

Mr. Thurber: Well, we will ascertain whether that is true or not, and if it is true, we will let you know.

Mr. Stanley: Of course, the point in my mind, Mr. Brand, is, I take it from what you have read there that that represents a statement made by Mr. Barlum or authorized by Mr. Barlum, and that if the bank transferred it, that they were taking Mr. Barlum's word for it, if the bank made out that application. Now, how can Mr. Butler say whether it was true in fact? He may say that Mr. Barlum so told him.

Mr. Brand: Well, that is what I am trying to get at.

Mr. Stanley: If he recalls that. But, whether it is true is another matter.

By Mr. Brand:

Q. Is it not a fact that Mr. Barlum, in applying for this $100,000 loan, stated that the purpose of the loan was to settle tax claims of the Steamship Company by the United States Government, based on questions of depreciation and invested capital?

A. I don't remember.

[fol. 140] Q. Or, I will put it in another way. Didn't Mr. Barlum, when he made application for this loan, state to you that he wanted it in order to pay tax claims to the Government?

A. I don't remember.

Q. Do you know any other reason why he did want it?

A. I don't remember the reasons that were stated.

Q. Well, look at the balance sheet here of December 16th, 1924, and see whether that refreshes your recollection as to any purposes that the steamship company had in making the loan, other than as stated in the application to the Securities Commission?

A. No, sir; it does not. That just simply is the balance sheet which was required at the time.

Q. Well then, you don't recall just what was stated to you at that time, is that the idea?

A. No, sir.

Q. And you are going to look into your files and see whether there is anything in there that will refresh your recollection?

A. Yes, sir; I will.

Q. And if you get any more definite recollection of what did occur, you will state it on the record here before we finish the taking of the depositions?

A. Yes, sir. What date was that, Mr. Brand?

Q. The application to the commission was December 23, 1924, and your letter was December 22nd. You do recall that the $100,000 loan was made and was later taken up or refunded in part?

A. Yes, sir; partially paid and partially refunded.

Q. Can you fix the time when the mortgage was discharged?

[fol. 141] Mr. Brand: We can concede that, can we not? What date do you say?

Mr. Thurber: Mr. Brand, the abstract of title shows that.

Mr. Brand: What is the date?

Mr. Thurber: May I show it to Mr. Butler?

Mr. Brand: Yes.

A. February 15, 1927.

Q. Is it not a fact that about that time a new mortgage was made on the Steamship Thomas Barlum for $75,000?

A. Yes, sir.

Q. Made by the steamship company to Detroit Trust Company as trustee?

A. Yes, sir.

Q. At the time that mortgage was made how much of the first mortgage of $100,000 remained unpaid?

A. $50,000.

Q. What was the amount of the new mortgage?

A. $75,000.

Q. So that it was for approximately $25,000 more than the amount necessary to take up the old mortgage, is that right?

A. Yes, sir.

Q. Did you handle the negotiations with the steamship company for the new mortgage of $75,000 also?

A. Yes, sir.

Q. By the way, the first mortgage was guaranteed by John J. Barlum, was it not?

A. I don't remember that.

Q. The second mortgage was, was it not?

A. I think it was, Mr. Brand, but I don't remember exactly.

Q. All right. I show you Exhibit 3, a letter from Detroit Trust Company, Lawrence K. Butler, vice-president, to John J. Barlum, president of Barlum Steamship Company, [fol. 142] dated January 28th, 1927, and ask you whether you sent that letter to Mr. Barlum as president?

A. Yes, sir.

Mr. Brand: I offer in evidence Exhibit 3.

(The document was marked Exhibit 3.)

Mr. Stanley: The general objection I made, referring to the testimony, I also want to have apply, for the same reasons, to all exhibits offered in evidence.

Mr. Brand: That will be so understood. The stenographer will mark the two copies of Exhibit 3, and those will be considered as furnished.

Q. Did you read this Exhibit 3, Mr. Butler?

A. I read it through hastily.

Q. You notice it says that the notes are to be guaranteed by John J. Barlum individually?

A. Yes, sir.

Q. You know of your own knowledge that the loan was made?

A. Yes, sir.

Q. And consummated in accordance with the understanding reflected here in Exhibit 3?

A. Yes, sir.

Q. Have you any canceled check showing the remittance or payment to the Barlum Steamship Company of the proceeds of that loan and how it was applied?

A. No, sir.

Mr. Brand: Have you any record showing how it was applied, or is that on the $200,000?

[fol. 143] Mr. Thurber: That is on the $200,000. We haven't any record on that in the office here.

By Mr. Brand:

Q. I show you a copy of a voucher which will not be marked as an exhibit and ask you whether you did not, on March 21, 1927, remit to the steamship company $23,213.15 as the net proceeds of the $75,000 loan referred to in Exhibit 3?

A. Yes, sir.

Q. I ask you whether what is marked as Exhibit 4, attached to the voucher, is not the detailed statement which accompanied the voucher?

A. Yes, sir. It is the detailed statement showing the disposition that was made of the proceeds of the loan.

Mr. Brand: I offer that in evidence as Exhibit 4.

(The document was marked Exhibit 4.)

Mr. Brand: I will furnish you with two copies of Exhibit 4 for the deposition.

Q. You have no records of any other payments of the proceeds of this $75,000 loan other than this $23,213.15, have you?

A. There were payments made in that statement.

Q. I mean, to the steamship company?

A. No, sir.

Q. Now, it is a fact, isn't it, that $50,000 of the proceeds of the $75,000 mortgage was used to take up a balance under the mortgage of December 1, 1924, the $100,000 mortgage?

A. Yes.

Q. I show you Exhibit 1-A and ask you whether that is [fol. 144] not a copy of the $100,000 mortgage that was furnished to the steamship company by your office? It has your stamp on it and it was produced from Mr. Barlum's files. I think there is some sort of a certification on the back also.

A. Yes. This is a copy of a mortgage given by the Barlum Steamship Company to the Detroit Trust Company as trustee under date of December 1, 1924, securing an indebtedness of $100,000, covering the Steamer Thomas Barlum.

Q. And that is the one that was referred to in your letter of December 22, 1924, and the application to the Securities Commission, is that right?

A. Yes, sir.

Mr. Brand: I offer in evidence Exhibit 1-A.

(The document was marked Exhibit 1-A.)

Mr. Brand: I have no objection to the exhibit being produced at any time, that is, the original of that mortgage, if it varies from the copy.

Mr. Thurber: Well, this is certified.

Mr. Brand: I assumed it was. We won't furnish copies of that but will produce it at any time on request.

Witness: What is the trust number on that?

Mr. Brand: 3328.

Q. I ask you whether Exhibit 5 is not a copy furnished by your company to the steamship company of the $75,000 [fol. 145] mortgage dated February 15, 1927, covering the Thomas Barlum?

A. Yes, sir. This is a copy of a mortgage given by the Barlum Steamship Company to the Detroit Trust Company as trustee, under date of the 15th day of February, 1927, securing an indebtedness of $75,000 covering the Steamer Thomas Barlum.

Mr. Brand: I offer that in evidence. We won't furnish copies but we will produce the original upon request.

(The document was marked Exhibit 5.)

Q. I show you a letter, Exhibit 6, from your company, by Mr. N. C. Mente, Assistant Secretary, to John J. Barlum, dated March 23, 1927, and ask you whether that letter

was not sent by your company to Mr. Barlum on or about the date thereof?

A. Yes, sir, it was.

Mr. Brand: I offer it in evidence.

(The document was marked Exhibit 6.)

Q. I show you Exhibit 6-A, being a canceled note of the Barlum Steamship Company, dated December 1, 1924, No. 11, and ask you whether that is not one of the series of notes aggregating $50,000, referred to in the letter, Exhibit 6, dated March 23, 1927?

A. Yes, sir. This is one of twenty notes making up the $100,000.

Q. And being part of the $50,000?

A. Being note No. 11, part of the $50,000 referred to.

Mr. Brand: I offer that exhibit in evidence.

(The document was marked Exhibit 6-A.)

[fol. 146] Mr. Stanley: I was going to suggest, if you have ten more, offer them by number and put them all in at once and save time.

Mr. Brand: Is it conceded that there was, accompanying Exhibit 6, the said note 11 and similar notes to 20, inclusive? The letter says notes 11 through to 20.

Mr. Stanley: Well, they are all here.

Mr. Brand: And it is so conceded?

Mr. Stanley: Yes. How much apiece are they?

Mr. Brand: Each for $5,000.

Q. Prior to February 21, 1929, the Barlum Steamship Company made application, did it not, to your company, then known as the Detroit & Security Trust Company, for a $200,000 loan on the Thomas Barlum?

A. Yes, sir.

Q. And the negotiations for that loan for your company were handled by you?

A. Yes, sir.

Q. And for the steamship company by Mr. John J. Barlum? A. Yes, sir.

Q. I show you Exhibit 7 and ask you whether, in behalf of your company, you did not write that letter marked Exhibit 7 to John Barlum on February 21, 1929?

A. Yes, sir.

Mr. Brand: I am having the stenographer mark two copies of that letter as Exhibit 7 for the purpose of the deposition and I offer the same in evidence.

(Document was marked Exhibit 7.)

[fol. 147] Q. Was the purpose of that loan as stated in your letter, Mr. Butler, Exhibit 7?

A. Yes, as I understand it, or as I understood it.

Q. The $50,000 note outstanding, referred to on the second page of Exhibit 7, was the balance, was it not, of the $75,000 previous mortgage?

A. Yes, sir.

Q. Reference is made in your letter, Exhibit 7, to $100,000 "to take up principal debt of John J. Barlum and Thomas J. Barlum & Sons now held by us to the amount of $100,000." What did that indebtedness consist of?

Mr. Stanley: Object to that question as incompetent and immaterial. The entire agreement was reduced to writing, which is now in evidence. It can't be varied by any oral testimony.

A. Collateral loans in our collateral loan department.

By Mr. Brand:

Q. That is, John J. Barlum individually owed the Detroit Trust Company, and Thomas Barlum & Sons owed the Detroit Trust Company?

A. Yes, sir.

Q. On loans made, secured by collateral?

A. Yes, sir.

Q. To your knowledge did either of those obligations in any way relate to the steamship company?

A. I have no knowledge of that.

Q. Do you know when such obligations had been created?

A. I don't understand the question, Mr. Brand.

Q. When did Mr. Barlum borrow the money and when did Thomas Barlum & Sons borrow the money referred to?

[fol. 148] A. It was an indebtedness that had been running for some time. I have not the exact dates in mind.

Q. Quite a while before this mortgage was made?

A. Yes, sir.

Q. And have you any records here showing what indebtedness it was? You were to produce those according to the stipulation here?

A. I have the original loan sheets out in the office, Mr. Brand, but I haven't them over here. I could get those over here very easily.

Q. I show you Exhibit 8 and ask you whether that is not a statement rendered by your company to the Barlum Steamship Company showing the disposition of the proceeds of the $200,000 loan made pursuant to your letter, Exhibit 7?

A. Yes, sir, it is.

Mr. Brand: I will offer in evidence Exhibit 8 and have copies made.

(The document was marked Exhibit 8.)

Q. Now, I show you Exhibit 8-A, which is produced from your file, and ask you whether or not that is an authorization dated March 18th, 1929, signed by the Barlum Steamship Company, directing you in regards to the disposition of the proceeds of the $200,000 loan last referred to?

A. Yes, sir.

Mr. Brand: I offer Exhibit 8-A in evidence and will look to you for copies of same.

Mr. Thurber: Very well.

(The document was marked Exhibit 8-A.)

[fol. 149] Mr. Brand: The $200,000 mortgage on the Thomas Barlum that was executed pursuant to the proposition named in Exhibit 7, is the one on which your libel is based, is it not, and that is referred to in your bill of complaint as Exhibit 1, is it?

Mr. Thurber: The mortgage?

Mr. Brand: Yes.

Mr. Thurber: That is Exhibit A.

By Mr. Brand:

Q. I ask you, Mr. Butler, if Exhibit A attached to your libel is the $200,000 mortgage that was executed pursuant to the proposition contained in Exhibit 7? That is your letter.

A. And that is February 21, 1929?

Q. Yes, sir.

A. Yes, sir.

Q. And Exhibits 8 and 8-A relate to the proceeds of that mortgage?

A. Yes, sir.

Q. I ask you whether the $75,000 mortgage which preceded it was covered by any application to the Michigan Securities Commission, do you know?

A. I don't remember, but I don't think so, as I don't think we offered those for sale.

Q. Well, I can state that I find no application to the Securities Commission, and if you do, let us know. This $200,000 mortgage was involved in an application to the Commission?

A. Yes, sir.

Q. I show you Exhibit 9 and ask you whether that is not the application that was made to the Michigan Securities Commission relating to the $200,000 mortgage?

A. Yes. This is a photostatic copy of it.

[fol. 150] Mr. Brand: All right. I offer that in evidence.

(The document was marked Exhibit 9.)

Q. I ask you whether or not that application was prepared by Detroit Trust Company?

A. I don't remember.

Q. Well, look at that letter that I am showing Mr. Thurber there and see whether that doesn't help you?

A. It was prepared by the Detroit Trust Company and sent to the steamship company to be completed and executed.

Q. Now, Exhibit 8, the statement relating to the proceeds of that mortgage, correctly sets forth the disposition of the proceeds of the $200,000 mortgage referred to, does it not?

A. Yes, sir.

Q. How much money of the proceeds of that $200,000 mortgage was paid over to the Barlum Steamship Company by your company?

Mr. Stanley: I object to that upon the ground that the statement of the disposition of the proceeds, which is in writing and in evidence, is the best evidence of the fact, because it shows just how the moneys were disposed of.

A. The net balance, $42,896.44.

By Mr. Brand:

Q. Now, was that paid by a check of the Detroit Trust Company to the Steamship Company?

A. I presume it was.

Q. You haven't the check here?

A. I have not the check here.

[fol. 151] Q. $50,350.33 was retained by the trust company to take up the $50,000 of bonds on the previous mortgage, is that right?

A. It was retained to pay up the balance of the outstanding notes of the $75,000 mortgage.

Q. Now, this item of $45,510 required to take up Thomas Barlum & Sons note, being principal and interest, that was one of the collateral notes that you referred to before?

A. Yes, sir.

Q. Owing to your company by Thomas Barlum & Sons?

A. Yes, sir.

Q. Do you know who Thomas Barlum & Sons was, or what it was?

A. Do you mean do I know the nature of the organization?

Q. Yes. Was it an individual or corporation or what?

A. I think it was a partnership; I am not sure.

Q. Do you know what business it was engaged in?

A. In the meat business; packing business.

Q. A company that had been doing business in Detroit for a long time prior to that time?

A. A great many years.

Q. And you had dealt with it prior to this time in March of 1929?

A. Yes, sir.

Q. And the note referred to of Thomas Barlum & Sons Company was returned to the Thomas Barlum & Sons Company, or to Mr. Barlum, from your company?

A. Yes, sir.

Q. I show you Exhibit 10, being a note of Thomas Barlum & Sons Company, to the order of Detroit & Security Trust Company, January 16th, 1929, due 90 days after date, at 6 per cent interest, in the amount of $45,000, and ask you [fol. 152] whether that is the note that was taken up out of the proceeds of this $200,000 issue? Look through there. There are some notations of yours there, and some of your associates?

A. Yes, I think it is.
Q. All right.
A. It looks like it.

Mr. Brand: I offer the note in evidence and will furnish copies of it.

(The document was marked Exhibit 10.)

Q. I have attached for my own convenience to this note, which is not a part of the exhibit, another note of Thomas Barlum & Sons Company to Detroit Trust Company, dated April 17th, 1925, for $57,500, due four months after date, with 6 per cent interest, and attached to it is a notation "Do not release this note, order of L. K. Butler." Does that refresh your recollection as to whether the note last mentioned was later renewed for $45,000 in the form of Exhibit 10?

A. This note is the tail end of this obligation, yes, sir.

Q. The note, Exhibit 10, is the tail end of the note of April 17th, 1925, that is right, Mr. Butler?

A. Yes, sir, the unpaid balance.

Q. You say Exhibit 10 represents the unpaid balance of the note of April 17, 1925?

A. There might have been intervening notes, there must have been, because no note ran that long. That is the ultimate unpaid balance of it.

Q. Now, the note of April 17th, 1925, was secured by the pledge of various shares of Cadillac Square Improvement [fol. 153] Company stock, Barlum Steamship Company stock and Barlum Realty Company stock, is that not so?

A. Also endorsements.

Q. And also the endorsements of Louis Barlum, Thomas Barlum, John J. Barlum and Thomas Barlum & Sons?

A. Yes, sir.

Q. Now, Thomas Barlum was the father of John J. Barlum, was he not?

A. As I understand it.

Q. And that is the reason why you did not want the note released until it was paid, because he was dead?

A. Yes, sir.

Q. When this $200,000 issue was made and this note of Thomas Barlum & Sons taken up, you returned the pledge

of collateral and the canceled note and the original note to Mr. Barlum, or someone else?

A. Yes, sir.

Mr. Brand: Let the record show that we produce those papers.

Q. Now, with reference to the item shown on Exhibit 8, $33,566.50, the John J. Barlum note, I show you Exhibit 11, being the note of John J. Barlum to Detroit & Security Trust Company, December 12, 1928, and ask you whether that is not the note that was taken up as stated in Exhibit 8?

A. It is, yes, sir.

Mr. Brand: I offer the note, Exhibit 11, in evidence.

(The document was marked Exhibit 11.)

Q. Is it not a fact that this note, Exhibit 11, was secured by the pledge of certain shares of Barlum Steamship Com- [fol. 154] pany stock and American State Bank stock, pledged by Mr. Barlum?

A. Yes, sir.

Q. Do you know whether that note represented a loan made on December 12, 1928, or whether that was a balance of some previous loan made?

A. That was a refinancing of a previous obligation.

Q. And there is attached to that note in my files here, attached by me, a blank power of attorney relating to stock, signed by Mr. Barlum August 11, 1922. Have you been doing business with him for years prior to this note?

A. For a long time prior to that note, but I don't remember exactly how long.

Q. And when you took the proceeds of the $200,000 issued to pay this note, you marked the note "Paid" and sent it back to Mr. Barlum?

A. Yes, sir.

Mr. Brand: Let the record show we will produce that note.

Q. I show you Exhibit 12, a letter from your company per A. W. Massnick to Barlum Steamship Company, May 7th, 1929, and ask you whether that letter was sent by your company to the Steamship Company accompanied by notes No.

6/15, dated February 15, 1927, par value $5000 each, total $50,000, being the unpaid balance of the $75,000 mortgage?

A. Yes, sir.

Mr. Brand: I offer that exhibit in evidence.

(The document was marked Exhibit 12.)

[fol. 155] Q. I will ask to have marked as Exhibit 12-A, note No. 6 referred to in the letter, Exhibit 12, and ask you whether 12-A is not note No. 6 referred to in the letter, Exhibit 12?

A. Yes, sir.

Mr. Brand: And is it conceded that the other notes referred to in the letter are in the same form as note 12-A, and were also enclosed? They were all marked "Canceled."

Mr. Stanley: Yes.

Mr. Brand: I offer Exhibit 12-A in evidence.

(The document was marked Exhibit 12-A.)

Q. Now, with reference to the mortgage on the John J. Barlum, have you a copy of a commitment or application with reference to that issue? I haven't anything filed here on it.

A. Yes, sir.

Q. I show you Exhibit 13 and ask you whether that is a duplicate of the commitment relating to the loan of $200,000 on the Steamship John J. Barlum involved in your libel herein?

A. It is a duplicate original of our offer dated December 23, 1927, together with the acceptance by the Barlum Steamship Company.

Mr. Brand: Now, will you make me copies of that, Mr. Thurber?

Mr. Thurber: Yes.

Mr. Brand: I offer in evidence Exhibit 13.

(The document was marked Exhibit 13.)

[fol. 156] Q. I show you Exhibit 14 and ask you whether that is not the application that was made to the Securities Commission in connection with that loan?

A. Apparently it is a photostatic copy of the Securities Commission application.

Mr. Brand: I offer it in evidence.

(The document was marked Exhibit 14 and offered in evidence.)

Q. I ask you whether Exhibit 15 is not the authorization of the Barlum Steamship Company delivered to your company relating to the disposition of the proceeds of that loan dated January 7th, 1928?

A. Yes, sir.

Mr. Brand: I offer that in evidence. I will ask for copies of that also.

(The document was marked Exhibit 15.)

Q. I ask yor whether Exhibit 15-A is not a statement rendered by your company of the disposition of such proceeds?

A. Yes, sir.

Mr. Brand: I offer that in evidence and ask for copies of that also, Mr. Thurber.

(The document was marked Exhibit 15-A.)

Q. Now, Exhibit 15, the authorization, there reference is made to an amount to cover bonds, $50,000, in coupons $32,-281.25, due January 1, 1928, from John J. Barlum, and so forth. What did that refer to?

[fol. 157] A. That referred to the outstanding bond issue of John J. Barlum on various real estate properties.

Q. On which the Detroit Trust Company as trustee had made a loan or held a mortgage?

A. On which there were outstanding bonds secured by mortgage to the Detroit Trust Company as trustee.

Q. Real estate bonds?

A. Yes, sir.

Q. Am I correct that that is the issue covering the Merchants Building, Lewis Hotel and the Dixieland?

A. Covering those pieces, or the leases on those pieces, yes.

Q. And also the Lawyers Building?

A. Yes, sir.

Q. Then that was the $1,000.000 issue?

A. It was more than $1,000,000.

Q. Yes, $1,250,000 that had been executed by John J. Barlum and wife to the Detroit Trust Company, trustee, or the $1,250,000 mortgage that had been executed by John J. Barlum and wife?

A. Yes, sir.

Q. You understood that that was one of the purposes of getting this loan of $200,000 on the John J. Barlum?

A. I was not there during those negotiations, Mr. Brand. I can't answer that.

Q. Who handled this?

A. The offer is signed by Mr. Browning.

Q. Well, we have him down here as a witness. Is he available today?

A. Yes, sir.

Q. Then it says, "Retain $10,000 to be applied on John J. Barlum note." Was that one of his individual collateral loans?

A. Yes, sir.

[fol. 158] Q. According to your statement, Exhibit 15-A, that $10,000 was retained out of the proceeds?

A. Yes, sir.

Q. To apply on John J. Barlum's note?

A. Yes, sir.

Q. And likewise the $50,000 of bonds of the issue that you referred to the real estate issue?

A. Yes, sir.

Q. And $32,281.25 of coupons?

A. Yes, sir.

Q. The net amount that the Barlum Steamship Company got out of that was $102,801.55, paid direct, I mean?

Mr. Stanley: I object to that question as calling for a conclusion.

Mr. Brand: Well, I don't mean it to be that way. Strike the question.

Q. The amount of cash that was turned over out of the proceeds to the Barlum Steamship Company was the figure $102,801.55, is that right?

A. As a matter of fact, in both these cases, the entire proceeds was credited on our books to the Steamship Company and then paid out under its order, and the net amount remitted to the Steamship Company in this case was $102,801.55.

Mr. Brand: I think that is all, Mr. Butler.

Cross-examination.

By Mr. Stanley:

Q. Generally speaking, Mr. Butler, did you apply the proceeds of these two mortgages covering the Thomas Barlum and the John J. Barlum now in suit in exact con-
[fol. 159] formity with the written directions given to your bank by the Barlum Steamship Company at the time the loans were closed?

A. Yes, sir.

Q. Now, you made application to the Michigan Securities Commission and do make application only in cases where the Detroit Trust Company is selling bonds to the general public?

A. Is selling or where it intends to sell.

Q. Yes, where you intend to sell?

A. Yes, sir.

Q. And did you make application in the case of these two mortgages in suit?

A. Yes, sir.

Q. For the reason that you intended to sell the bonds to the general public?

A. Yes, sir.

Q. And did you sell the bonds in turn to the general public?

A. Yes, sir.

Q. After the execution of the various mortgages?

A. Yes, sir.

Q. And how, in a general way, was that done?

A. Through our bond department to our bond department clients.

Q. I show you a printed circular labeled at the top "Detroit Trust Company bond department" and at the top saying "We own and offer subject to prior sale" and there is then described certain bonds of the Barlum Steamship Company covering the Steamer Thomas Barlum. And, did your trust company prepare that circular?

A. Yes, sir.

Q. And did it receive general distribution among the buying public?

A. Yes, sir.

Q. And do you know as a fact that the bonds mentioned in that circular were actually sold to the general public by your bond department?

A. Yes, sir.

[fol. 160] Mr. Stanley: I offer that in evidence as Exhibit 16.

(The document was marked Exhibit 16.)

Mr. Brand: Objected to as incompetent, irrelevant and immaterial.

By Mr. Stanley:

Q. I now show you a similar circular which refers to certain bonds on the Steamer John J. Barlum and ask you if that was prepared and issued by your trust company?

A. Yes, sir.

Q. And were the bonds mentioned in that circular sold to the general public through your bond department?

A. Yes, sir.

Mr. Stanley: I offer that in evidence as Exhibit 17.

Mr. Brand: Same objection.

(The document was marked Exhibit 17.)

Mr. Stanley: That is all.

Redirect examination.

By Mr. Brand:

Q. Mr. Butler, your trust company bought these bonds, did it not?

A. Yes.

Q. And then offered them for resale?

A. Yes.

Q. And before it could do that, your understanding is that they had to be approved by the Michigan Securities Commission?

A. Yes, sir.

Q. That is, the resale?

A. Yes.

Q. And in the case of the $75,000 issue, where you didn't think you applied to the Commission, you don't think that you sold those bonds to the public?

A. I know we did not.

[fol. 161] Q. Were those bonds distributed to the public or retained by you?

A. You are speaking now of the last two issues?

Q. The last $200,000 issue?

A. They were sold and delivered.

Q. To the public?

A. Yes, sir.

Q. And does your company own any of them now?

A. I don't know whether we do now or not. They were all sold at one time, but whether we dealt in any of them, I would have to look up and see if any of them got back or not. They were all sold at one time.

Mr. Brand: Well, as long as you opened up where the bonds are, I want to know where they are, because that is material.

Mr. Stanley: Do you want to know the individual owners?

Mr. Brand: Oh, no.

Q. You state of your own knowledge that all of the bonds of these issues were sold?

A. Yes, sir.

Q. By the Detroit Trust Company?

A. Both of these issues.

Q. Were they sold to any trust of which the Detroit Trust Company was trustee or fiduciary?

A. That I have not examined. I merely looked up the bond account records but not the sales records.

Q. Well, you have a record of all bonds sold; you have a register?

A. I beg your pardon.

Q. You have a register of all bonds sold?

A. The bond ledger sheet shows when they were sold but not to whom sold.

[fol. 162] Q. Would it be more convenient for you to go over there and look at it or would you bring it in here, or would you want me to do that? I want to know what bonds were sold and what bonds you hold today, if any. Now, I can go over there and look at it if you want me to. I show you a group of statements and memos, which I will state for your information were returned to us by your company, some of which bear memorandas that I think are in your handwriting, and I ask you whether or not these statements were not furnished to your company in connection

with various mortgages that you have testified to and later returned to the Barlum Steamship Company, or Mr. Barlum.

A. They are statements which were furnished to us in connection with the collateral loans.

Q. And the collateral loans you refer to are those of whom, John J. Barlum?

A. John J. Barlum and Thomas Barlum & Sons Company.

Q. The pencil notations on there are in your handwriting on these various exhibits?

A. Some of them are in my handwriting. That is not my handwriting but that is. That is not my handwriting (indicating).

Q. How about these?

A. That is. That is. That is not. That is. That is not (indicating). Some of them are, and some of them are not.

Mr. Brand: Mark the first sheet Exhibit 18 and then 18-A, and so forth, down through each sheet.

[fol. 163] Q. Are the pencil notations on 18 in your handwriting, Mr. Butler?

A. Yes, sir.

Q. 18-C?

A. Yes, sir.

Q. 18-D?

A. No.

Q. 18-E?

A. Yes.

Q. On the back of 18-E?

A. No.

Q. Any of it?

A. No, except the following, S. S. Coe, $246,000.

Q. Exhibit 18-F?

A. No.

Mr. Brand: I offer these exhibits in evidence and we won't furnish copies but will produce it upon request.

(Documents were marked Exhibits 18, 18-A to F, inclusive).

Q. Did you notice this memorandum here on sheet 18-B "From L. K. Butler" Saturday, January 23, 1926?

A. Yes.

Q. Do you recollect in what connection that memorandum was made?

A. No, sir, except as it says, in connection with the call on Mr. Barlum.

Q. Now, is it not a fact that in connection with the making of the two $200,000 mortgages in question, that it was understood as part of the deal that the items that were authorized to be paid out of the proceeds were to be paid out?

Mr. Stanley: I object to that question as calling for the conclusion of the witness; further, upon the ground that it tends to vary written instruments already in evidence.

[fol. 164] A. It was intended that the proceeds should be paid out according to those orders that were given.

By Mr. Brand:

Q. That represented what was indicated?

A. Yes.

(Short interruption.)

Q. Now, what have you in this memorandum that you have there, Mr. Butler?

A. I have the answer to your question as to where the bonds were sold.

Q. Just state it in your own way into the record, and then if there is something else, I will ask you.

A. The bonds on the Steamer John J. Barlum, being the issue of December, 1927, were sold to the public outside except for $25,000 par value of the bonds which was sold to the trust accounts at the trust company. There are now in those trust accounts in our office the sum of $25,000 par value of the bonds and the trust company has in its individual bond account $5000 of the bonds which it has repurchased at some time since the original sale.

On the Steamer Thomas Barlum, that being the issue dated March 1, 1929, we sold them all to the public except $74,000 which were sold to the trust accounts at the trust company, various trust accounts, and there are now $81,000 in the various trust accounts, and, the increase being caused by the fact that bonds have come into new trusts, which were not original sales into trusts by us. There is now in

[fol. 165] the trust company's individual bond account $4,000 par value of the bonds.

Mr. Brand: That gives it. Thank you.

Recross-examination.

By Mr. Stanley:

Q. Just one question. Will you just explain briefly what you mean by "trust accounts"?

A. I mean any accounts which represent the various capacities of the trust company in its trust department as distinguished from its individual ownership.

Q. In other words, these trust accounts really mean trust estates, do they not?

A. Yes, sir.

Q. In other words, they are estates of decedents in cases where your bank has been named as executor and trustee?

A. Yes, sir.

Q. And you are handling the decedent's estate for the benefit of the cestui que trust?

A. Yes, sir.

Mr. Stanley: That is all.

Redirect examination.

By Mr. Brand:

Q. And the purchase of these bonds that you refer to, that is, the $25,000 on the John J. Barlum and $74,000 on the Thomas Barlum was for estate purposes?

A. Yes, sir.

Q. As investments for the estate?

A. Yes, sir.

Q. And those investments were made by you in your trust capacity for the trustee, and this increase from $74,000 to $81,000 was not due to similar purchases, but by [fol. 166] decedents who had purchased, having died, and named your company as trustee or executor?

A. Yes, sir.

Mr. Brand: All right. Thank you very much.

(Sgd.) Lawrence K. Butler.

RUTH ALLEMAN, being by said Orrin C. Jones, notary public, first duly cautioned and sworn to testify the whole truth, deposed and said as follows:

On direct examination.

By Mr. Brand:

Q. Your name is Ruth Alleman?
A. Yes, sir.
Q. And you are above the age of 21?
A. Yes, sir.
Q. How long have you been employed by Mr. Barlum?
A. Nineteen years.
Q. Were you Mr. Barlum's secretary or employed also by the Steamship Company?
A. I was Mr. Barlum's secretary and also employed by the Steamship Company.
Q. And you are a bookkeeper?
A. Yes, sir.
Q. And in connection with the work of the Steamship Company you sign also as auditor, is that right?
A. Yes, sir.
Q. And you have the books and records of the Steamship Company during the year 1924 on down?
A. Yes, sir.
Q. Down in 1929 or 1930?
A. Yes, sir.
Q. They are here in the office now?
A. Yes, sir.
Q. You were so employed at the time the three mortgages [fol. 167] on the Thomas Barlum and the one mortgage on the John J. Barlum ships were made?
A. Yes, sir.
Q. Now, going back to the $100,000 mortgage made on the Thomas Barlum in December, 1924, the application to the Securities Commission recites that the purpose of the loan was the settlement of tax claims with the United States Government? Was the Government asserting a tax claim against the Steamship Company at that time?
A. Yes, sir.
Q. Approximately how much was that tax claim?
A. About $100,000.
Q. And for what years was it?

A. From the year 1917 through 1920.

Q. Back as far as 1917?

A. Yes, sir.

Q. And had the steamship company employed a tax expert to handle the matter?

A. Yes, sir.

Q. And do you remember the name of that party?

A. Harry Meisner.

Q. Harry H. Meisner?

A. Yes, sir.

Q. Have you recently refreshed your recollection in regard to the matter of the tax claim to see what papers you had in your files bearing on that?

A. Yes, sir.

Q. And you know that the tax claim ran over $100,000?

A. Yes, sir.

Q. Was Mr. Meisner successful in getting the tax claim reduced somewhat?

A. Yes, sir.

Q. What was the ultimate amount, approximately, that the claim was fixed at?

A. I couldn't tell you what the amount was.

Q. Well, was it around $100,000?

A. I think it was less than $100,000; about $75,000.

Q. I will read you a report that I have here to refresh [fol. 168] your recollection: "Tax liability reported by the agent of $92,439.59, not including 1918 unpaid assessment of $28,135.80, has been reduced to $46,267.29." Is that the way you recall?

A. Yes, sir.

Q. So that 1918 was around $28,000 and the prior years $46,000?

A. Yes, sir.

Q. At the time this $100,000 loan was made, was there any other pressing obligation?

A. Yes, sir.

Q. Of the Steamship Company?

A. No, sir.

Q. Where was the boat at that time, in December of 1924, December 23rd, 1924, laid up?

A. She was laid up. I don't know what port.

Q. It was laid up?

A. Yes, sir.

Q. That was after the season?

A. Yes, sir.

Q. And attached to the application to the Securities Commission, Exhibit 2, is a statement of the assets and liabilities of the Steamship Company at that time. Is that a correct statement?

A. Yes, sir.

Q. Now, who else besides the Government did the Barlum Steamship Company owe at that time?

A. Notes at the American State Bank.

Q. And that was for what, for what purpose; the general purposes of the Steamship Company?

A. General purposes of the Steamship Company.

Q. You had a running line of credit at the American State Bank?

A. Yes, sir.

Q. And at the time this statement attached to Exhibit 2 was gotten up, had the amount of the tax due to the Government actually been determined, or was it still in the [fol. 169] course of negotiations, in December of 1924?

A. Well, it had been determined.

Q. You think it had been?

A. I think it had.

Q. Meisner's report that I read from is dated November, 1924, so it had been determined?

A. I think it had, yes, sir.

Q. Now, in connection with this loan of $100,000 on the Thomas Barlum, what was the total amount that the Steamship Company received from the Detroit Trust Company out of the proceeds of that loan?

A. $100,350.

Q. And then it paid back to the Trust Company certain expenses in connection with the loan, did it not?

A. Yes, sir.

Q. What was done with that money?

A. Well, in December, 1924, $16,786.27 was paid to the Barlum Land Company and $5000 to the Barlum Realty Company.

In February of 1925 checks were issued to L. F. Woodworth for additional income tax in the amount of $18,225.33, $28,041.96, and in March another check was issued for $28,135.80.

Q. Now, were those large checks to Woodworth checks in payment of this tax claim that we have referred to before?

A. Yes, sir.

Q. So, approximately $75,000 was paid on tax alone in addition to the $16,000 item to the Barlum Land Company and $5000 to the Realty Company, is that right?

A. Yes, sir.

Q. Now, in between the time that you received the proceeds of that loan, $100,350, in December, and the time of payment of the tax items, what was done with that fund; [fol. 170] was payment made to the bank?

A. There was a payment made at the bank to take up the notes.

Q. What date? My record shows December 22, 1924, paid American State Bank $58,204.24?

A. I think that is correct.

Q. And then when funds were required for the tax claims, did you get some from the bank?

A. Yes, sir. New loans were made.

Q. Is that in the main what the proceeds of that $100,000 issue were used for?

A. Yes, sir.

Q. You know that of your own knowledge?

A. Yes, sir.

Q. What was the Barlum Land Company?

A. Mr. John Barlum's personal buildings.

Q. In other words, that was an assumed name at that time, not a corporation, or was it a corporation?

A. Not a corporation at that time.

Q. So that was a name that he used for the transaction of business relating to certain of his real estate?

A. Yes, sir.

Q. And later was that real estate taken over by the Barlum Land & Improvement Company?

A. Yes, sir. It was incorporated.

Q. Incorporated as Barlum Land & Improvement Company?

A. Yes, sir.

Q. These lands that were owned by the Barlum Land Company and later by the Improvement Company are the lands, leases, rather, that were mortgaged to the Detroit Trust Company back in 1925, were they not?

A. Yes, sir.

Q. For $1,250,000?
A. Yes, sir.
Q. And the mortgagors were Mr. and Mrs. Barlum?
A. Yes, sir.
Q. And then later the Barlum Land & Improvement [fol. 171] Company took over the title to those properties?
A. Yes, sir.
Q. The Barlum Realty Company was what?
A. The land on the base of Cadillac Square.
Q. This building?
A. Yes, sir.
Q. The Barlum Tower?
A. Yes, sir.
Q. This is a separate corporation known as the Barlum Realty Company?
A. Yes, sir.
Q. On which the Barlum Tower, in which we are sitting, is located?
A. Yes, sir.
Q. Now, when the $75,000 mortgage was made on the Thomas Barlum in February, 1927, how much of the proceeds of that mortgage came to the Barlum Steamship Company?
A. A check for $23,213.15.
Q. On what date?
A. On March 21, 1927.
Q. That check was deposited in a bank account?
A. It was deposited in the name of the Steamer Thomas Barlum.
Q. At what bank?
A. At the American State Bank.
Q. The system of the Steamship Company with reference to the two ships was what, with reference to the bank accounts?
A. Interchangeable checks.
Q. No, I mean, did they keep separate bank accounts?
A. Separate bank accounts were kept, yes, sir.
Q. Give me that again. The Thomas Barlum bank account was kept in what bank?
A. American State Bank.
Q. And the John J. Barlum?
A. National Bank of Commerce.
Q. This check for $23,213.15 was kept in what bank?
A. In the American State Bank.

[fol. 172] Q. The Thomas Barlum bank account?

A. Yes, sir.

Q. What items were paid out of that check, out of the proceeds of that check? Before you answer that, on the day that check was received, that account showed an overdraft, did it not, of some $1600?

A. Yes, sir.

Q. Give me a list of the items that were paid out of that bank account and out of the $23,213.15.

A.

Overdraft	$1,618.49
Captain Mahon	1,000.00
Thomas Barlum & Sons Co.	1,400.00
Captain Cain	150.00
Thomas Barlum & Sons Co.	400.00
Steamer John J. Barlum	400.00
Peoples State Bank	112.37
F. A. McIntosh	62.50
R. Alleman	37.34
F. A. McIntosh	62.50
R. Alleman	37.34
Steamer John J. Barlum	600.00
Barlum Realty Company	12,500.00
Louis P. Barlum	600.00
American Spiral Pipe Co.	1,840.00
Boland & Cornelius	2,400.00

Q. The total of those checks and the overdrafts is $23,220.54, and during the time of those withdrawals no deposits had been made in that account other than the $23,213.15, is that right?

A. Yes, sir.

Q. Captain Mahon was master of what ship?

A. Of the Steamer John J. Barlum.

Q. Of the John J.?

A. Yes, sir.

Q. The payment to Thomas Barlum & Sons Company of [fol. 173] $1400 represented what?

A. Cash loan.

Q. Loans?

A. Yes, sir.

Q. Made to the Steamship Company previously?

A. Possibly.

Q. Well, how do you know it represented loans? Was that the practice?

A. Well, that was the practice of it.

Q. Captain Cain was whom?

A. Captain of the Steamer Thomas Barlum.

Q. Now, what you said about the $1400 to Thomas Barlum & Sons Company relates also to the $400 item?

A. Yes, sir.

Q. Then, paid to Steamer John J. Barlum, $400; what was that for?

A. That was a check deposited to the bank account of the Steamer John J. Barlum in the National Bank of Commerce.

Q. From that account?

A. Yes, sir.

Q. For bills that were allocated to that steamer, is that right?

A. Yes, sir.

Q. Peoples State Bank, $112.37; do you know what that was for?

A. I don't recall what that was for.

Q. F. A. McIntosh was whom?

A. He was bookkeeper for the Steamship Company.

Q. Here in the Detroit office?

A. Yes, sir.

Q. And R. Alleman is yourself?

A. Yes, sir.

Q. So the checks to you and to Mr. McIntosh were for your services in the local office, is that right?

A. Yes, sir.

Q. $600 paid to Steamer John J. Barlum was transferred to this account, is that right?

A. Yes, sir.

[fol. 174] Q. Barlum Realty Company, $12,500; what was that, an advance to the Realty Company?

A. Yes, sir.

Q. A loan, is that right?

A. Yes, sir, loan.

Q. At that time it was erecting the Barlum Tower, was it not?

A. Yes, sir.

Q. It had broken down about January of that year?

A. Yes, sir.

Q. Louis P. Barlum, $600; what was that?
A. Loan.
Q. Who was Louis P. Barlum?
A. A brother of John J. Barlum.
Q. A personal loan to him?
A. Yes, sir.
Q. American Spiral Pipe Company, $1840?
A. That was accounts payable against the Steamer Thomas Barlum.
Q. For work done on the Steamer Thomas Barlum?
A. Yes, sir.
Q. Do you know how long previous?
A. No, sir.
Q. A running account, was it?
A. Yes, sir.
Q. The boat had not been in operation since the winter of 1926, is that right, up to that time?
A. That is right.
Q. You had an account with that company right along?
A. Yes, sir.
Q. Boland & Cornelius, who are they?
A. They are agents at Buffalo, New York.
Q. And what was that $2400 for?
A. Money advanced to captains or the engine crew for fitting out purposes.
Q. They had paid that money out and this was reimbursement to them?
A. Yes, sir.
Q. You kept that account that way that they would lay the money out and bill you later on for it?
A. Yes, sir.
[fol. 175] Q. That was the usual practice?
A. Yes, sir.
Q. Now, of that $23,000 there was transferred then to the bank account of the John J. Barlum two items of $400 and $600, is that right, $1000?
A. $1400.
Q. You are thinking of Thomas Barlum & Sons. I am talking about the John Barlum now. There was transferred $400 and $600 to the John Barlum steamer of this $23,000?
A. There is a mistake somewhere.
Q. Steamer John J. Barlum, $400?

A. Yes, sir.

Q. Then down below that you have another item in April, John J. Barlum, $600?

A. I know, but I have against the bank account of Steamer John J. Barlum $1400.

Q. Well, I will not need that yet. Out of this $23,213.15 you testified that $1000 was transferred to the bank account of the Steamer John J. Barlum, is that right?

A. Yes, sir.

Q. Now, that $1000 was used for the bills that had been allocated to that boat, is that right?

A. Yes, sir.

Q. Bills that were incurred probably in the operation of that boat, is that right?

A. Yes, sir.

Q. Accounts that had been rendered to the Barlum Steamship Company, is that right?

A. Yes, sir.

Q. I have the list here of them but I don't think it is of enough consequence to go into. It is only $1000. Here is what was paid out of that account.

[fol. 176] Mr. Thurber: Did you bring out the Thomas Barlum & Sons payment, what that was for?

Mr. Brand: I will.

Q. You testified that you thought the Thomas Barlum item of $1400 was money advanced by Thomas Barlum. Is there any question about that or is it possible that that was for supplies furnished to one or the other of the boats?

A. No, sir. It was not for supplies. It was money advanced.

Q. Well, now, switching over to the John J. Barlum account, showing the receipt of that money that was deposited in the account of John J. Barlum Steamer at the National Bank of Commerce, you show a deposit first and then an overdraft on March 22nd, 1927, of $145.95?

A. Yes, sir.

Q. Was that the correct amount?

A. Yes, sir.

Q. In addition to the $1000 that was transferred, of which $400 was transferred on March 28th, 1927, and $600 on April 21, 1927, what other deposits were made in that account up to the 11th of March?

A. A deposit on March 22nd of $1400.

Q. You don't know where that came from, do you?

A. No.

Q. Those two items transferred in that one deposit constituted the entire deposit in that account up to April 11th, did it not?

A. Yes, sir.

Q. Now, just read the disbursements that were made out of that account from the time of the overdraft on March [fol. 177] 22nd to and including April 11th, 1927?

A.

Overdraft	$145.95
K. A. Scott & Company	10.00
North Shore Supply Company	19.86
Vacuum Oil Company	86.53
Kraft Ship Yards	48.10
Chicago Shipbuilding	133.04
Erie Oil Company	70.07
Lake Carriers Association	389.30
L. P. Barlum	500.00
Ernest Thompson	75.00
Central Shipping Company	50.00
Woodside Brothers	29.75
Chicago Shipbuilding Company	61.48
Dominion Towing and Wrecking	329.38
Port Arthur Boiler Works	437.65

Q. Now, other than the overdraft and the Lake Carriers Association item and the Louis P. Barlum item, were those bills that had been incurred in connection with the operation of the Steamer John J. Barlum prior to that time?

A. Yes, sir.

Q. What was the Lake Carriers Association item for?

A. It is an assessment made against the Steamship Company.

Q. For what, membership?

A. For membership, yes, sir.

Q. And what was the $500 to Louis P. Barlum for?

A. Cash advanced.

Q. A personal loan to him?

A. Yes, sir.

Q. The total of those items, including the overdraft, is $2,386.11, leaving a balance on hand in that account on April 11th, 1927, of $13.89?

[fol. 178] Mr. Stanley: May I inquire?

Mr. Brand: Yes.

Mr. Stanley: You called attention to a loan to L. P. Barlum. You first called that as a loan from the Thomas Barlum to the John J. Barlum, did you?

Mr. Brand: No, it was transferred over there.

Mr. Stanley: From one bank account over there, you mean?

Mr. Brand: Yes. It was the Steamship Company account, of course.

Q. Now, taking up the proceeds of the $200,000 loan on the Thomas Barlum on March 1, 1929, according to your records you received how much; the Steamship Company received directly in cash or check how much of that loan and when?

A. On March 25, 1929, a check was received from the Detroit Trust Company for $42,896.44.

Q. In what bank account was that check deposited?

A. Deposited in the bank account of the Steamer John J. Barlum, National Bank of Commerce.

Q. That is on the John J. Barlum?

A. Yes, sir.

Q. Now, have you prepared here an analysis of the bank account of the John J. Barlum during the period these funds were in there?

A. Yes, sir.

Q. Showing the withdrawals and also showing that $20,000 of those funds deposited were transferred to the bank account of the Thomas Barlum on March 27th?

A. Yes, sir.

[fol. 179] Q. And showing what became of those funds after they were deposited in the bank account of the Thomas Barlum?

A. Yes, sir.

Mr. Brand: Well, it will shorten it a great deal to mark this as Exhibit 19, and I will have two of them marked as copies for the depositions.

(The document was marked Exhibit 19.)

Q. Now, the statement on the first page is just what you have testified to, as to how the $42,896.44 was handled in banking?

A. Yes, sir.

Q. Now, perhaps we better go to the third page. You show the receipt of that money deposited in the National

Bank of Commerce account of the John J. Barlum, is that right?

A. Yes, sir.

Q. And then on the day that was received you had a balance in that particular bank account of $70.92, is that right? A. Yes, sir.

Q. As shown in detail above that?

A. Yes, sir.

Q. Now, is there listed on the opposite side of that sheet the checks that were drawn out against that account?

A. Yes, sir.

Q. And these checks were the proceeds of the $70.92 that had been deposited prior to that time and the $42,896.44, is that right?

A. Yes, sir.

Q. Now, these checks here were for items that were being carried on your books as allocated to the operations of the John J. Barlum Steamer?

A. Yes, sir.

[fol. 180] Q. Except which ones?

A. Steamer Thomas Barlum, $20,000.00, and Steamer Thomas Barlum, $400.00.

Q. So all but two items, all but those two items were items that were allocated to the John J. Barlum operation?

A. Yes, sir.

Q. That was the past season operation?

A. Yes, sir.

Q. Now, you take Rollins Burdick, Hunter Company, $7,725.86, what was that?

A. Insurance.

Q. Past due item?

A. Yes, sir.

Q. You had been carrying that account on your books up to that time?

A. Yes, sir.

Mr. Stanley: While you are at it, have her specify marine insurance on the particular boats.

By M. Brand:

Q. Do you know whether or not it was marine insurance on the Steamer John J. Barlum?

A. Yes, sir.

Q. The next item is a membership item, Lake Carriers Association?

A. Yes, sir.

Q. And "Lake Ship Clear," what is that?

A. That is an expense bill in connection with carrying grain.

Q. In what way?

A. They charge so much for trimming and out-turn on a boat.

Q. Who was that paid to?

A. Lake Shippers Clearance Association.

Q. And that was a bill on account of the previous season's operations?

A. Yes, sir.

Q. And had been carried as an account on your books?

A. Yes, sir.

[fol. 181] Q. And were those all open accounts or notes?

A. All open accounts.

Q. What is the next, Metropolitan Casualty?

A. Well, that is the same thing as the Lake Carriers, Lake Shippers Clearance Association. This is loading and unloading of the grain.

Q. Mullen Coal Company?

A. That is fuel.

Q. Open account? A. Yes sir.

Q. Running balance?

A. Yes, sir.

Q. Pittsburgh Coal Company, the same?

A. Yes, sir.

Q. Boland & Cornelius, the same as the other item that you testified to before?

A. Yes, cash.

Q. That was reimbursement for advancements made by them?

A. Yes, sir.

Q. J. W. Wolvin.

A. That is a grain charge.

Q. Ernst Thompson.

A. That is a ship keeper.

Q. Where?

A. On the Steamer John J. Barlum.

Q. When it was laid up?

A. Yes, sir.

Q. During the past season?

A. Yes, sir.
Q. William Parry.
A. He was a mate.
Q. Second mate or first mate?
A. He was first mate, I believe.
Q. Was that his bonus?
A. No, sir. That is the balance of his wages.
Q. For the previous season?
A. Yes, sir.
Q. W. C. Houston?
A. Chief engineer of the Steamer John J. Barlum.
Q. The same as Parry?
A. Yes, sir.
Q. Balance for wages?
A. Yes, sir.
[fol. 182] Q. Steamer Thomas Barlum, $20,000.00; that was transferred to the bank account in the American State Bank, is that right?
A. Yes, sir.
Q. Interlake Steamship Company.
A. That would be supplies for the Steamer John J. Barlum.
Q. For the previous year?
A. Yes, sir.
Q. Electric Laundry, the same?
A. Yes, sir,
Q. Hutchins Laundry, the same?
A. Yes, sir.
Q. American Shipbuilding, $173.43.
A. The same.
Q. Steamer Thomas Barlum, $400.00, transferred to its account?
A. Yes, sir.
Q. Going to the second sheet of Exhibit 19, at the date the $20,000.00 transfer was made, the account of the Thomas Barlum in the American State Bank showed an overdraft of how much?
A. $719.49.
Q. The details of which appear above, is that right?
A. Yes, sir.
Q. And these checks that are listed here are all items that were allocated on the Steamship Company's books to the operations of the Thomas Barlum, is that right?
A. Yes, sir.

Mr. Thurber: Excuse me. Doesn't that right there cover this whole thing?

Mr. Stanley: It speaks for itself.

Mr. Brand: Some of those items are shore items and some are not.

A. There are just two items there, Mr. McIntosh and myself, for office wages.

[fol. 183] Q. All right. L. J. Manion. Who was he?

A. He was engineer of the Steamer Thomas Barlum.

Q. Previous season's salary?

A. Yes, sir.

Q. Moreau, the same?

A. Yes, sir.

Q. Wellhausen the same?

A. Yes, sir.

Q. Captain Cain?

A. Yes, sir.

Q. Garlick, the same?

A. Yes, sir.

Q. Endries, the same?

A. Yes, sir.

Q. American State Bank, you don't know what that was for, do you, $20.00?

A. No, sir, I do not.

Q. Now, these other names that we have had before, and the character of the item is the same where we had it before as it is here, is that right?

A. Yes, sir.

Mr. Brand: Most of this has been read now into the record. If you do need a copy, I will have to have it run it off for you?

Mr. Thurber: That covers the Thomas Barlum, does it?

Mr. Brand: Yes, sir.

Q. Out of the proceeds of the John Barlum loan, that is, on the John Barlum $200,000.00 loan in December of 1927, there was apparently paid $50,000.00 of principal and $32,281.25 of interest and an additional $82.13 interest on past due items in connection with the real estate bond issue made by John Barlum and wife to Detroit Trust Company, trustee, of $1,200,000.00 on lands and leased lands that were later taken over by the Barlum Land & Improvement Com-

pany. The Barlum Steamship Company had no connec-
[fol. 184] tion with those properties, did it?

A. No, sir.

Q. No interest in it whatsoever?

A. No, sir.

Q. Nor with the Barlum Land & Improvement Company that was subsequently incorporated?

A. No, sir.

Q. There was also paid out of the proceeds of that $200,000.00 steamship loan a note of John J. Barlum held by the Detroit Trust Company of $10,000.00. Do you know whether the trust company held a note for $10,000.00 or whether that was applied on a larger note?

A. It was applied on a larger note.

Q. I show you Exhibit 20 and ask you whether that is the larger note that you refer to?

A Yes, sir.

Q. And does that show the endorsement of the $10,000.00 paid?

A. Yes, sir, January 7th, 1928.

Q. That was paid out of the proceeds of this $200,000.00 bond issue?

A. Yes, sir.

Mr. Brand: I offer the note in evidence as Exhibit 20. It is dated August 11th, 1927, $50,000.00, signed by John J. Barlum, payable to the order of Detroit Trust Company, due six months after date with 6 per cent interest, and endorsed on the back of it is payment of interest on November 11th, 1927, $75.00, and on January 7th, 1928, $10,000.00 of principal, leaving unpaid balance $40,000.00.

Attached to the note is a pledge of collateral that I don't
[fol. 185] offer in evidence unless counsel wants it, showing that it is collateraled with certain shares of the Barlum Steamship Company, certain shares of the Peninsular State Bank and certain shares of the American State Bank. It is marked "paid, Detroit Trust Company," without date.

I offer it in evidence.

(The document was marked Exhibit 20.)

Q. You received this note back from the trust company at some later date when the $40,000.00 was paid?

A. Yes, sir.

Q. And the $10,000.00 that is endorsed on the back is the $10,000.00 taken out of the proceeds of this loan?

A. Yes, sir.

Q. Now, did the Barlum Steamship Company have anything to do with the loan, or was it interested in it in any way?

A. No, sir.

Q. That was a personal obligation of Mr. John J. Barlum?

A. Yes, sir.

Q. Now, at the time the balance of the loan of $200,000.00 on the John J. Barlum was received, what was the overdraft, or the balance, rather, in the bank account of the Thomas Barlum at the American State Bank?

A. The bank balance was $90.71.

Q. Now, the proceeds of that loan were deposited in that bank account rather than the bank account of the John J. Barlum, is that right?

A. Yes, sir.

Q. I can ask you one group question here that will cover it all. Were not the following items paid out of that account: Luke Manion, $500?

A Yes, sir.

[fol. 186] Q. Thomas Barlum & Sons, total of $4000.00?

A. Yes, sir.

Q. Cadillac Square Improvement Company, $52,500.00?

A. Yes, sir.

Q. Barlum Realty Company, $18,600.00?

A. Yes, sir.

Q. John J. Barlum, $5500.00?

A. Yes, sir.

Q. Lewis Hotel, $19,000.00?

A. Yes, sir.

Q. Captain Mahon, $500.00?

A. Yes, sir.

Q. Steamer John J. Barlum, $2000.00?

A. Yes, sir.

Q. Of the items that I have mentioned, how many of them have to do in connection with the operation of the Steamship John J. Barlum, or any obligation of the steamship?

A. Manion.

Q. Who was he?

A. He was engineer of the Steamer Thomas Barlum.

Q. For past season's services?
A. Yes, sir.
Q. And Mahon?
A. Captain A. J. Mahon was captain of the Steamer John J. Barlum and the $2000.00 transfer to the bank account of the steamer John J. Barlum.
Q. Those are the only items that had to do with the operation of any boats?
A. Yes, sir.
Q. Or of the business of the Steamship Company?
A. Yes, sir.
Q. Cadillac Square Improvement Company was what?
A. The Barlum Hotel.
Q. That is a limited partnership association that owns and built and mortgaged the Barlum Hotel, the building next to the Tower here?
A. Yes, sir.
Q. And that is a twenty-story or more hotel building in the down town section of Detroit, is that right?
A. Yes, sir.
[fol. 187] Q. Does the Steamship Company have any interest in it?
A. No, sir.
Q. That was advanced to that association or company, is that right? A. Yes, sir.
Q. And the Barlum Realty Company is the company that owns the Barlum Tower?
A. Yes, sir.
Q. And $18,600.00 was an advancement to that company, is that right?
A. Yes, sir.
Q. Lewis Hotel, wasn't that one of the pieces of property that had been mortgaged by John J. Barlum and wife to the Detroit Trust Company, trustee, to secure $1,200,000.00 of bonds?
A. Yes, sir.
Q. That has been referred to heretofore?
A. Yes, sir.
Q. And that money was needed for what purpose, that $19,000.00; in the operation of the hotel?
A. In the operation of the hotel, yes, sir.
Q. Were they furnishing the hotel at that time?
A. Yes, sir.

Q. And $19,000.00 of that money went to that project, is that right?

A. Yes, sir.

Q. Now, turning to the $2000.00 that was transferred out of this bank account to the account of the John J. Barlum, National Bank of Commerce, that transfer was made on January 13th, 1928, was it?

A. Yes, sir.

Q. At that date what was the bank balance?

A. $17.34.

Q. How was that money paid out?

A. There was one check issued to Boland & Cornelius for $1821.60.

Q. On what date?

A. On January 14th.

[fol. 188] Q. 1928?

A. Yes, sir.

Q. Was that another check?

A. There was another check on January 31st to the Great Lakes Towing Company for $234.87.

Q. That necessitated that bank balance leaving an overdraft of $13.39, is that right?

A. Yes, sir.

Q. So that as I get this right now, out of the entire proceeds of this issue a total of $2000.00 was used to pay bills that had any connection with the Steamer John J. Barlum, is that right?

A. A total of $3000.00.

Q. Was Manion on the John J. or the Thomas Barlum?

A. Manion was on the Thomas Barlum.

Q. Well, I am talking now about the John J. Barlum?

A. $500.00 was for the Steamer John J. Barlum and $2000.00 was the transfer to the bank account of the Steamer John J. Barlum.

Q. Manion was on the John J. Barlum?

A. Yes, sir.

Q. But that was paid out of the Thomas Barlum account?

A. Yes, sir.

Q. Now, I will frame my question over again. What was the total amount of the proceeds of the $200,000.00 mortgage on the John J. Barlum that was used for any bills incurred in connection with the operation of that steamer?

A. $2500.00.

Q. Will you make up a list of these checks that we have just referred to?

A. Yes, sir.

Q. There was $5000.00 that was paid to John J. Barlum in one of these, $5500.00, John J. Barlum, drawn out of the [fol. 189] bank account of the Thomas Barlum on January 10th. Do you know what Mr. Barlum did with that money?

A. He took up a note at the Romeo Savings Bank for $5000.00.

Q. I show you Exhibit 21 and ask you whether that is the note?

A. Yes, sir.

Q. Exhibit 21 is the note of John J. Barlum to the Romeo Savings Bank?

A. Yes, sir.

Mr. Brand: It is dated December 8th, 1927, for $5000.00, marked paid on January 9th, 1928. I offer it in evidence.

(The document was marked Exhibit 21.)

Q. Did the Steamship Company have any connection with that note or receive any benefit from it?

A. No, sir.

Q. A private matter of Mr. John J. Barlum at that bank?

A. Yes, sir.

Mr. Brand: That is all.

Cross-examination.

By Mr. Stanley:

Q. Miss Alleman, have you the bank books here of the Barlum Steamship Company going back into 1924?

A. I have the cash account.

Q. I mean, the pass book of the bank?

A. No, sir, I have not.

Q. Are they in your office?

A. I think not.

Mr. Brand: We made a search for them. I asked to see those before. They have a single entry set of books; not double.

[fol. 190] By Mr. Stanley:

Q. Well, taking this State Bank account, when you drew a check against the account in that bank, the check was

signed "Barlum Steamship Company," wasn't it, with something special on to indicate the character of the account?

A. The check was signed "Barlum Steamship Company"?

Q. Yes.

A. Yes, sir.

Q. And when you drew checks on the other bank account —in the National Bank of Commerce, was it?

A. Yes, sir.

Q. Those also were signed "Barlum Steamship Company"?

A. Yes, sir.

Q. So that when you deposited the proceeds of the mortgage for $75,000.00 that you received, you received a check for $23,000.00 plus from the Detroit Savings Bank payable to the order of the Barlum Steamship Company, did you?

A. Yes, sir.

Q. Detroit Trust Company, payable to the order of the Barlum Steamship Company?

A. Yes, sir.

Q. That is true?

A. Yes, sir.

Q. And the Barlum Steamship Company owned the Steamer Thomas Barlum and the Steamer John J. Barlum at that time?

A. Yes, sir.

Q. And those were the only two boats that the Steamship Company did own?

A. Yes, sir.

Q. Did they have any other assets other than those two steamboats and whatever other incidental properties they might own in connection with the operation of them?

A. No, sir.

[fol. 191] Q. So that the business of the Barlum Steamship Company was the operation on the Great Lakes of two steamers?

A. Yes, sir.

Q. And those are the two steamers that are involved in these two suits that we are now here on?

A. Yes, sir.

Q. You kept purely as a matter of convenience in your own bookkeeping a separate account for the Steamer Thomas Barlum and John J. Barlum?

A. Yes, sir.

Q. But all of the money in both accounts belonged to the Barlum Steamship Company?

A. Yes, sir.

Q. So that when you took money out of one account and put it in another account, it was purely as a matter of convenience, wasn't it?

A. Yes, sir.

Q. And when you took money out of the other account and put it into this one, that was equally a matter of convenience, wasn't it?

A. Yes, sir.

Q. In handling the business of the Barlum Steamship Company?

A. Yes, sir.

Q. Now, will you open up your books over there as of the 25th day of March and point out to me——

Mr. Brand: What year?

Mr. Stanley: 1929—the proceeds of the mortgage on the Steamer Thomas Barlum. And, I want you to first open up the item and show me the entry in your book for $45,-510.00.

Mr. Brand: What was that?

[fol. 192] Mr. Stanley: Payment to Thomas Barlum & Sons Company.

Mr. Brand: $42,896.44 I have.

Mr. Stanley: Well, the disbursement item shows the amount required to take, being principal and interest, $45,-510.00.

Q. Show me the entry in your book dealing with that item?

A. That item never came through our books. This is the amount of the check that was received from the trust company and this is the entry as it was put on our bank account. These amounts were deducted by the trust company and never came into our hands.

Q. Do you mean to tell me that you never made a single entry into your book for the item of $45,510.00?

A. Not that I know of.

Q. Well, the moneys were the moneys of the Barlum Steamship Company, were they not?

A. Yes, sir.

Q. The whole proceeds of this mortgage, that is true, isn't it?

A. Yes, sir.

Q. And the amount of the mortgage was $200,000.00, that is right?

A. Yes, sir.

Q. And out of that $200,000.00, after all expenses were paid, there was a net total of $194,800.00 coming to the Barlum Steamship Company?

A. Yes, sir.

Q. Now, have you any entry in your books showing the receipt of $194,800.00 by the Barlum Steamship Company, the proceeds of that mortgage?

A. The only entry that I have is the deposit of $42,896.44.

Q. Did you make the annual income tax returns for the [fol. 193] Barlum Steamship Company?

A. No, sir.

Q. Well, were you the bookkeeper?

A. Yes, sir.

Q. Did someone in your office make the annual returns?

A. The annual returns were made by public accountants.

Q. Did they make the returns based entirely on this set of books that you now exhibit to us?

A. As far as I know, they did.

Q. Without reference to any other paper. Now, have you any entry in your books respecting the item of $33,566.50 shown on Exhibit 8?

A. Will you pardon me a minute until I get the other set of books? As these books were set up, you see, we had the single entry; just about that time the double entry book was set up. Now, just a moment.

(Short interruption.)

Q. All right. Well, now, perhaps you can tell us what is the date of the first entry of any description in that set of books you now produce?

A. January, 1929.

Q. January, 1929. Now, this loan was consummated on the 20th of March, 1929. Will you please turn to your record in that set of books and show us the entry relating to an item of $45,510.00 contained on Exhibit 8. You

needn't interpret it for us. What do your books show to be the relation of that item?

A. Well, the Barlum Realty Company was charged with $45,510.00; John J. Barlum, $33,500.00.

Q. Just a moment. One at a time. You charged the [fol. 194] Barlum Realty Company with $45,510.00, is that right, in March of 1929?

A. Debited the Barlum Realty Company.

Q. That is the same. Now, before we finish with that item, will you tell us whether the Barlum Realty Company has ever repaid to the Barlum Steamship Company that item of $45,510.00?

A. No, sir.

Q. So that today the Barlum Realty Company owes the Barlum Steamship Company $45,510.00 at least?

A. Yes, sir.

Q. Now, will you turn to your book and tell me what your book shows with reference to the item of $33,566.50 appearing on Exhibit 8?

A. The account of John J. Barlum was charged with that.

Q. Has John J. Barlum ever repaid any part of that to the Barlum Steamship Company, $33,566.50?

A. No, sir.

Q. It still appears as a debit against him on the books of the corporation?

A. Yes, sir.

Q. Now, will you tell us what entries you have in your book relating to the item of $20,923.50 appearing on Exhibit 8?

A. That item was charged to John J. Barlum.

Q. Also charged to John J. Barlum?

A. Yes, sir.

Q. Has he ever repaid to the corporation any part of that money?

A. No, sir.

Q. And he still owes the corporation the amount of that particular item?

A. Yes, sir.

Q. Now, referring to Exhibit 19, all of the items on the second sheet of Exhibit 19 in the second subdivision thereof, [fol. 195] representing payments to various people, represent payments for items that accrued in the operation of

the Steamers John J. Barlum and Thomas Barlum owned by the Barlum Steamship Company, do they not?

A. Yes, sir.

Q. Every item there amounting to $20,759.27, is that correct?

A. Yes, sir.

Q. Now, referring to the third sheet of Exhibit 19 and with particular reference to the second section of items on the page, every item in the list aggregating $42,945.78 relates to payments incurred in the operation of the Steamers John J. Barlum and Thomas Barlum, owned by the Barlum Steamship Company?

A. Yes, sir.

Q. That is correct, isn't it?

A. Yes, sir.

Q. And this transfer of the $20,000.00 item from one account to another, as you stated a few moments ago, was merely a matter of convenience for you personally or for your employer, in keeping his books?

A. Yes, sir.

Q. In keeping, perhaps, separate items, showing in a separate way the respective earnings of the Thomas Barlum and the John J. Barlum?

A. Yes, sir.

Q. And that was the only purpose of it?

A. Yes, sir.

Q. Now, John J. Barlum is practically the sole owner of the Barlum Steamship Company, isn't he?

A. Yes, sir.

Q. Only qualifying shares outstanding to other *people*?

A. Yes, sir.

Q. And who is the secretary of the company?

A. His name is C. W. Fawcett.

Q. Who was the secretary in 1927 or 1929?

A. Thomas J. Barlum.

[fol. 196] Q. And what relation is he to John J. Barlum?

A. Brother.

Q. Is his interest in the company any more than nominal; just a qualifying share?

A. No, sir.

Q. Have you a qualifying share in the company?

A. No, sir.

Q. Are you a member of the board of directors?

A. No, sir.
Q. Were you ever a member of the board of directors?
A. No, sir.

Mr. Stanley: I guess that is all.

Redirect examination.

By Mr. Brand:

Q. Will you show me your stock record showing who were the stockholders of the company at the time these mortgages were made, and subsequent changes? Have you the stock certificate book with you?
A. I haven't the stock certificate book but I have a record that I have drawn off from it.
Q. Let me see it, please.
A. I will have to get it.

(Short interruption.)

Q. Now, Miss Alleman, may I see your list of stockholders? I show you Exhibit 22 and ask you whether that is a list of stockholders of the Steamship Company prepared by you from its records?
A. Yes, sir.

Mr. Thurber: I think she has shares in each steamer but not stock in the corporation.

[fol. 197] A. Total of 1700 shares in the Steamer Thomas Barlum, 1500 in the John J. Barlum, making 3200. It is incorporated for $320,000.

Mr. Brand: I offer this list in evidence as Exhibit 22.

(The document was marked Exhibit 22.)

Q. I ask you whether Exhibit 22 was prepared by you as representing the outstanding stock of the Barlum Steamship Company?
A. Yes, sir.
Q. And the certificates that are issued are all the same certificates, aren't they; certificates of stock of the Barlum Steamship Company?
A. Yes, sir.
Q. And there is no separate certificate for the Steamer John J. Barlum or for the Steamer Thomas Barlum, is there?

A. There is a certificate with the stamp "Steamer John J. Barlum" and "Steamer Thomas Barlum" on it.

Q. You have divided your certificates for your own purpose into those that are supposed to relate to Steamer John J. Barlum and Steamer Thomas Barlum, is that right?

A. Well, in the first place, the Steamer Thomas Barlum was built before the Steamer John J. Barlum.

Q. Then, the certificates that are listed under the heading "Steamer Thomas Barlum, 1700 shares" are those that were issued first, and those which are marked "Steamer John J. Barlum, 1500 shares" are the subsequently issued certificates, is that right?

A. Yes, sir.

[fol. 198] Q. And that indicates then the original and the increased capital stock?

A. Yes, sir.

Q. And you have a rubber stamp on them indicating whether they are the original or the subsequently increased stock, is that right?

A. Each steamer has a rubber stamp with the name of the steamer on it.

Q. Well then, to get the results, if you wanted to find out how much stock John J. Barlum had in the company, you would add all that he had under the name of Thomas Barlum plus all he had under the name of John J. Barlum, is that right?

A. Yes, sir.

Q. And this list shows the names of the people and the number of shares in the original and the subsequently increased stock, of the shareholders of this company?

A. Yes, sir.

Q. And a total of 3200 shares outstanding in capital stock of $320,000, is that right?

A. Yes, sir.

Q. Now, does this cover the entire years 1927, 1928 and 1929?

A. Yes, sir.

Q. So that at the time these various mortgages were executed in 1927 the shares were as indicated in the column under 1927?

A. Yes, sir. In 1928 there was no change.

Q. But in 1929 there was a change. Now, at the present time who are the stockholders?

A. As listed on that list.

Q. There has been no change up to date not reflected on this list?

A. No, sir.

Mr. Brand: That is all.

[fol. 199] Recross-examination.

By Mr. Stanley:

Q. In order to get the total amount of stock owned by any individual in the Barlum Steamship Company, it is necessary to add the Thomas Barlum amount and the John J. Barlum amount together?

A. Yes, sir.

Q. In each case?

A. Yes, sir.

Mr. Stanley: That is all.

(Signed) Ruth Alleman.

JOHN J. BARLUM, being by said Orrin C. Jones, notary public, first duly cautioned and sworn to testify the whole truth, deposed and said as follows:

Direct examination.

By Mr. Brand:

Q. Your full name is John J. Barlum?

A. Yes, sir.

Q. Now, Mr. Barlum, your first loan on the Steamers John J. or Thomas Barlum with the Detroit Trust Company was made when?

A. December, 1924.

Q. And at that time you borrowed $100,000 on the Steamer Thomas Barlum, is that right?

A. Yes, sir.

Q. You had your negotiations for that loan with the Detroit Trust Company?

A. Yes, sir.

Q. And who; which officer of that company?

A. Mr. Butler.

Q. You had been dealing with the company before?

A. Yes, sir.

[fol. 200] Q. You had some individual obligations with that company prior to that time?

A. Yes, sir.

Q. The Thomas Barlum & Sons Company was what?

A. Packing business.

Q. A Michigan corporation, engaged in the meat packing business?

A. Yes, sir.

Q. Wholesale and retail in Detroit?

A. Yes, sir.

Q. Established long prior to the organization of the Barlum Steamship Company?

A. Yes, sir.

Q. And it had loans with the Detroit Trust Company?

A. Yes, sir.

Q. At the time you were negotiating with Mr. Butler for the first $100,000 loan on the Steamer Thomas Barlum, the Government was asserting a claim for income and profit taxes, was it not?

A. Yes, sir.

Q. A large claim?

A. Why, I think it was between $90,000 and $100,000.

Q. You knew that the Steamship Company would have to have funds for that when it was finally adjusted?

A. Yes, sir.

Q. And Miss Alleman has testified that a tax expert was employed to work on that matter?

A. Yes, sir.

Q. And finally got it adjusted around $75,000?

A. Yes, sir.

Q. Was it in that connection that you negotiated for this loan at the trust company?

A. Yes, sir.

Q. Was there any need for funds other than that by the Steamship Company?

A. No, sir.

Q. And the boat at that time, in February, was where?

A. In February she was laid up.

[fol. 201] Q. She was not operating at that time?

A. No, sir.

Q. And was there anything pressing concerning the care of the boat or the maintenance of the boat that required this loan?

A. No, sir.

Q. Did you explain that to Mr. Butler what you wanted it for?

A. Well, I suppose I did. He always asked me what I wanted to do with any loans I got.

Q. In other words, you haven't yet been able to get money out of a banker without letting them know what you were going to do with it, is that right?

A. No, sir.

Q. And was the settlement of the Government's tax claim made known to the Securities Commission?

A. Yes, sir.

Q. In the application?

A. Yes, sir.

Q. I show you Exhibit 2, the application to the Securities Commission, and ask you whether this is a photostatic copy of the application and if it bears the signature of yours, Thomas J. Barlum, as president and secretary of the company?

A. Yes, sir.

Q. The money that you got was used in the main for the purpose of paying taxes?

A. Yes, sir.

Q. Miss Alleman also testified that certain payments were made to the land company, $16,786.27, and the Barlum Realty Company, $5000?

A. Well, I suppose that is right.

Q. The Barlum Land Company was the name under which you were operating individually in connection with certain real estate?

A. It was a company.

[fol. 202] Q. It was a company, you say?

A. Barlum Realty Company.

Q. No, the Barlum Land Company?

A. Oh, the Barlum Land Company.

Q. Then later you organized a corporation known as the Barlum Land & Improvement Company?

A. Yes, sir.

Q. You made a loan of $1,200,000 individually on certain properties owned by yourself and wife, known as the Barlum Land Company properties, from the Detroit Trust Company, did you not?

A. Yes, sir.

Q. I want to fix the date of that mortgage?

A. $1,250,000 it was.

Q. Well, we have been calling it $1,200,000?

A. $1,250,000 I think it was.

Q. That mortgage was executed as of July 1, 1925, by the Detroit Trust Company, trustee, for $1,250,000, and covered the Lawyers Building, the Dixieland, the Lewis, and some others, is that right?

A. Yes, sir.

Q. Now, those properties you had handled previous to that time in the name of the Barlum Land Company, as you recall it?

A. Yes, sir.

Q. Now, the Barlum Realty Company is a separate Michigan corporation that owns this building, is that right?

A. The Barlum Tower; yes, sir.

Q. And has no connection with the Barlum Steamship Company, is that right?

A. No, sir.

Q. And the Barlum Steamship Company had no interest in it, did it?

A. No, sir.

Q. Nor in the Barlum Land Company, so-called?

A. No, sir.

[fol. 203] Q. Or Barlum Land & Improvement Company?

A. No, sir.

Q. Or Cadillac Square Improvement Company?

A. No, sir.

Q. Now, your next mortgage was in February of 1927 when a $75,000 mortgage was placed against the Thomas Barlum, $50,000 of that was used to take up that amount of the former $100,000 mortgage, and the balance, about $23,000, was deposited as Miss Alleman testified. You saw the statement of how that money was disbursed, did you not?

A. Yes, sir; $50,000 on bonds and the balance used to pay accounts payable of the company.

Q. Now, what was the practice of the Barlum Steamship Company in regard to its accounts? Did it have running accounts with various supply houses and insurance agencies and lake carrier associations?

A. Yes, sir.

Q. And, it would pay its bills when, as a rule; as it went along?

A. Well, we generally paid up everything every season. We generally paid everything every month, but any bills

left over, we would pay them before the close of the season, before January 1st.

Q. And your company was very successful, was it not, at the time these mortgages were made?

A. I think so.

Q. With large earnings?

A. Yes, sir.

Q. And it made another loan on the Thomas Barlum of $200,000 in March of 1929. You heard the testimony of Mr. Butler as to what items were deducted and paid out of that?

A. Yes, sir.

Q. The $50,000 of bonds that were taken up out of the [fol. 204] proceeds of that mortgage was the $50,000 balance of the previous mortgage on the Thomas Barlum, was it not?

A. Yes, sir.

Q. Now, going down to the individual items of Thomas Barlum & Sons Company, $45,510, that was an individual obligation of the Thomas Barlum & Sons Company to the Detroit Trust Company?

A. Yes, sir.

Q. And the other item of $33,000 odd, the John J. Barlum item, that was your individual item?

A. Yes, sir.

Q. And the $20,923.50, also John J. Barlum, that was your individual item taken out of the proceeds of the $200,000 Thomas Barlum mortgage?

A. At that time?

Q. Yes, right on the John J. Barlum note?

A. Yes, there were two notes, that is right.

Q. Now, was it understood at the time they agreed to give you this loan, or make this loan, that these items would be cleared up to the extent that they were deducted?

A. Yes, sir.

Q. Was that a condition attached to getting the loan?

A. That was the agreement.

Q. In other words, it was known at the time you applied that you could get the loan on that basis?

A. Yes, sir.

Q. And that those items were to be paid?

A. That is correct.

Q. Now, coming over to the John J. Barlum, there was only one mortgage there. There was paid out of that, on

account of the bonds and coupons, a total of $82,200 and some odd. Those were the bonds secured by the $1,250,000 mortgage of John J. Barlum and wife, is that right?
[fol. 205] A. Well, the Barlum Land & Improvement Company.

Q. Well, what you call the Barlum Land & Improvement Company?

A. Yes, sir.

Q. But the mortgage was made before the Barlum Land & Improvement Company was organized. It was made by John J. Barlum and Mrs. Barlum?

A. Yes.

Q. So that I am right, the $82,000 and some odd paid out of the proceeds of this loan on this steamer was used to pay for this real estate and bonds?

A. Well, that is the record, isn't it?

Q. Well, I am asking you.

A. Yes, I think it was.

Q. Now, what was the understanding when you got the commitment for this $200,000 loan on the John J. Barlum as to the payment of these bonds? Were they to be deducted and paid out of that?

A. Well, I presume that must have been it; that must have been the agreement. I just can't recall it now.

Q. Did they take out or pay any items other than contemplated when the loan was made?

A. They would not deduct any item that was not agreed upon to start with.

Q. There was an authorization given to them to do that. Now, I am asking you, was that the understanding at the time the loan was made?

A. Yes, sir.

Q. Now, there was a $10,000 item of yours, personally, that was paid to the Detroit Trust Company?

A. Yes, sir.

Q. Was it the understanding that that item was also [fol. 206] to be paid out of the proceeds?

A. Yes, sir.

Mr. Brand: Now, you wanted to ask Mr. Barlum some questions about labor claims. Will you give me what you want there, or do you care to ask him yourself, perhaps? That is all for the present.

Cross-examination.

By Mr. Stanley:

Q. Now, Mr. Barlum, whatever the payments may have been of the proceeds of both of these mortgages in suit by the Detroit Trust Company, were made as the result of an express authorization in writing by your corporation, signed by you?

A. Well, I would not say it was in writing. It may have been, but it was authorized.

Q. Well, they are already in evidence.

A. Well, it is all right then.

Q. And under your signature. You are the chief executive officer of the Barlum Steamship Company?

A. Yes, sir.

Q. Now, who was Thomas Barlum & Sons Company?

A. Thomas Barlum & Sons Company?

Q. Yes.

A. Well, that is the meat business.

Q. I know, but who owns it?

A. Why, it is out of business now.

Q. Who did own it in 1929 and 1927?

A. John J. Barlum, Thomas J. Barlum and Louis P. Barlum.

Q. In other words, you and two brothers?

A. Yes.

[fol. 207] Q. A copartnership?

A. No. It was a company.

Q. Corporation?

A. Corporation; yes, sir.

Q. Were you the chief stockholder in it?

A. Well, I was the manager of it.

Q. You were the head of the corporation?

A. Yes, sir.

Q. You were also the head of the Barlum Land & Improve Company and you were also the head of the Barlum Realty Company?

A. Yes, sir.

Q. And apparently it was your practice to borrow moneys back and forth?

A. Yes, sir.

Q. Between these several corporations?

A. Yes, sir.

Q. And each time it became a debt of one corporation to another?

A. Yes, sir.

Q. So that all of these moneys that went from the Barlum Steamship Company to these other corporations were loans by the Barlum Steamship Company to those corporations at the time?

A. Yes, sir.

Q. Now, Mr. Barlum, I show you what purports to be a consent of stockholders of the Barlum Steamship Company to mortgage the Steamer Thomas Barlum and I ask you if that document was executed by the persons whose names appear on the second page there?

A. Yes, sir.

Mr. Stanley: I offer that in evidence.

(Document marked Exhibit 23.)

Q. Now, I show you what purports to be a certified copy [fol. 208] of resolutions adopted by the Barlum Steamship Company on the 7th day of March, 1929, and ask you if that is correct?

A. Yes, sir.

Mr. Stanley: I offer that in evidence.

(The document was marked Exhibit 24.)

Q. Now, Mr. Barlum, I show you what purports to be a consent of the Barlum Steamship Company, consent of stockholders, to mortgage the Steamer John J. Barlum and ask you whether that document was executed by the persons whose names appear?

A. Yes, sir.

Mr. Stanley: I offer that in evidence.

(The document was marked Exhibit 25.)

Q. I now show you what purports to be a certified copy of a resolution of the board of directors of the Barlum Steamship Company held on the 4th day of January, 1928, and ask you if the statements therein contained are correct?

A. Yes, sir.

Mr. Stanley: I offer that in evidence.

(The document was marked Exhibit 26.)

Q. I show you what purports to be the original mortgage executed by the Barlum Steamship Company. Do you recognize that as the original mortgage executed by that Company?

A. Yes, sir.

Q. Under the date named?

A. Yes, sir.

Mr. Stanley: I offer that in evidence.

(The document was marked Exhibit 27.)

[fol. 209] Q. I now show you mortgage dated the 15th day of December, 1927, covering the Steamer John J. Barlum and ask you if you executed that mortgage on behalf of your corporation?

A. I did.

Mr. Stanley: I offer that in evidence.

(The document was marked Exhibit 28.)

Mr. Brand: These were attached to the libel.

Mr. Stanley: Yes. We will give you copies of the resolutions and consents.

Q. Mr. Barlum, I take it for granted, at the time or shortly after the time the mortgage, Exhibit 27, was executed, all of the claims against the Steamer Thomas Barlum., growing out of the operation of the ship, were actually paid?

A. Yes.

Q. And that is also true with respect to the John J. Barlum?

A. Yes, sir. We paid all of the bills every year.

Q. So, every maritime claim of any description against either or both of those boats was all cleaned up shortly, at least, after these two mortgages were executed?

A. Yes, sir; I think they were.

Mr. Stanley: Now, I offer in evidence two certificates of the collector of customs, the purpose being merely to show that there is nothing else on the record against the ships, except the mortgages already in evidence.

(The documents were thereupon marked Exhibits 29 and 30.)

[fol. 210] Mr. Stanley: That is all in this matter.

Redirect examination.

By Mr. Brand:

Q. Who are the stockholders of the Cadillac Square and Improvement Company?

A. John J. Barlum, the three Barlums and William B. Thompson and his two sons.

Q. How about your sister's children, the Greenings?

A. There is three of my sisters — own a small amount.

Q. And neither the Thompsons nor you- sisters or their families have any interest in the Steamship Company?

A. No, sir.

Q. Now, in the Barlum Realty Company, who is interested in that as stockholders?

A. My two brothers and myself.

Q. In the Barlum Land & Improvement Company?

A. Mrs. Barlum and myself.

Q. Not your brothers at all?

A. No.

Q. And in Thomas Barlum & Sons Company?

A. Well, the company is not in existence.

Q. But when it was in existence?

A. Just the three of us.

Q. Not your brothers?

A. No, sir.

Q. What you have described related to the time when these mortgages were made and the advancements were made?

A. Yes, sir.

Mr. Brand: That is all.

Recross examination.

By Mr. Stanley:

Q. Now, Mr. Barlum, there has been an intervening peti-
[fol. 211] tion filed in this case on behalf of William W. Parry of the John J. Barlum, first mate; William C. Houston, chief engineer of the same ship; Andrew R. Brabaw, first assistant engineer, and J. H. Young, second mate. This petition claims for William W. Parry, $544; William C. Houston, claims $1213.52; Andrew R. Brabaw claims $416, and Mr. Young $426.

If it is agreeable to you, as head of the company, to stipulate that these claims, respectively, are correct, and that they are due these men for services rendered the ship, why then we can stipulate the earned interest on this, because they are entitled to priority in any event, out of the funds?

A. Yes.

Mr. Brand: The steamship company admits the correctness of the various amounts, does it not?

A. Just a moment. Those accounts are all bonuses.

Mr. Brand: I understand, but the amounts are correct?

A. Yes. They got their money every trip. The salaries were paid every trip. These were bonuses that come under the conditions of the Lake Carriers Association, but we agreed to pay it and we acknowledge that we owe it. They are really not for services, or giving any service for it.

By Mr. Stanley:

Q. It really is in the nature of extra compensation?

A. Yes, sir. We agreed to pay it.

[fol. 212] Q. Depending on the happening of certain events, and the events happened?

A. Yes, we agreed to it.

Q. The computation on Mr. Parry's claim is $40.80, total $584.80; on Mr. Houston, interest, $91, total $1304.52; Mr. Brabaw, interest, $31.20, total $447.26; Mr. Young, interest, $30.45, total $456.45.

Mr. Brand: We concede the correctness of the computation of interest.

By Mr. Stanley:

Q. The Barlum Steamship Company has made no payments on account of either interest or principal on either of these mortgages since these suits were instituted, have they?

A. No, sir.

Mr. Stanley: That is all.

Redirect examination.

By Mr. Brand:

Q. What connection has the Detroit Trust Company today with the affairs of the Barlum Steamship Company, over a period of three or four years?

A. They have not had any connection.

Q. Well, now, wasn't there a change of officers in that company?

A. Oh, that was last year, 1930.

Q. 1930 or 1931?

A. Yes.

Q. Which?

A. 1931.

Q. In April?

A. I think it was.

Q. What happened then?

A. We had a meeting over there at the Detroit Trust Company.

[fol. 213] Q. What happened?

A. And we changed officers.

Q. Thomas, your brother, resigned as an officer, and Louis also?

A. Yes, sir.

Q. And who replaced them?

A. Mr. Livingstone and Mr. Fawcett.

Q. Mr. Livingstone and Mr. Fawcett?

A. Yes, sir.

Q. Both connected with the bank?

A. Connected with the trust company.

Q. And they were put in to replace your brothers as officers and directors?

A. Yes, sir.

Q. Now, where have the corporate records been?

A. At the trust company.

Q. Now, had they prior to that time ever been on the board?

A. No, sir.

Q. Had they ever had your corporate records?

A. Not up to that time.

Q. Now, these resolutions which were passed in connection with those bond issues, who prepared them?

A. The Detroit Trust Company.

Q. Who prepared the mortgages?
A. The Detroit Trust Company.
Q. Who prepared all the papers?
A. The Detroit Trust Company.
Q. Did you have any attorney representing you?
A. No.
Q. Whatever papers were signed were prepared by them?
A. By the trust company.
Q. And the form of resolution and the certificate that has been marked here, several of them, Exhibits 23, 24, 25 and 26, were submitted to you by them, is that right?
A. Yes, sir.

Mr. Brand: That is all.

[fol. 214] Recross-examination.

By Mr. Thurber:

Q. Mr. Barlum, Mr. Livingstone whom you mentioned, was placed on the board in place of one of the former directors, was an officer of the Peoples Wayne County Bank, was he not?
A. Yes, sir.
Q. And the Barlum Steamship Company was indebted, through its indebtedness to the American State Bank, to the Peoples Wayne County Bank, on account of that bank having taken over the affairs of the American State Bank?
A. Yes, sir.
Q. Mr. Fawcett you mentioned was an officer or employee of the trust company. Mr. Fawcett, as a matter of fact, was a shipping man who the bondholders' protective committee had employed to co-operate, if possible, with you, in obtaining work for the boats during this period, was he not?
A. Yes, sir.
Q. You didn't mean to say he was a member of the Detroit Trust Company?
A. Well, now, listen: When I said that, I meant that the only way I knew Mr. Fawcett was through Mr. Krim of the Detroit Trust Company. I supposed he was employed by Mr. Krim.

Mr. Thurber: I just wanted to straighten that out.
Mr. Brand: Neither Fawcett nor Livingstone are connected with the Detroit Trust Company?

Mr. Thurber: No, sir.

Mr. Brand: Livingstone with the Peoples Wayne County, [fol. 215] and Fawcett with the bondholders' committee?

Mr. Thurber: Yes.

Q. Mr. Barlum, in connection with this loan, you recall that Mr. Frank Eaman was present at the closing of the loan on the Steamer Thomas Barlum, and that some discussion was had with him on certain bills, certain obligations which caused us some trouble, and we discussed them with Mr. Eaman, and Mr. Eaman participated in some of our conversations. I think you will recall Mr. Eaman's connection?

A. Well, I don't remember. I don't remember of Mr. Eaman being in; I may be mistaken. I would not say he was not in, but I don't remember.

Q. He has represented you in the past, has he not?

A. He has sometimes.

Mr. Thurber: Of course, I can be sworn and state, because I was in them.

Mr. Brand: What was the situation? I am interested in it.

Mr. Thurber: Mr. Eaman, I am sure, examined at least one draft of these mortgages, because I remember sending one to his office. But, Mr. Barlum might not recall it.

A. I don't recall Mr. Eaman being in. I would not say that he was not.

Mr. Thurber: I will state positively he was, if it is necessary to be sworn.

A. I don't question it if you say that is so.

[fol. 216] Mr. Thurber: That is all I want to bring out, the fact that you don't recall whether he was, and he might have had something to do with it.

Mr. Brand: Let me ask you a question now, Mr. Witness: All of the mortgages are on the same form, aren't they?

Mr. Thurber: Substantially. By "the mortgages" you mean these two?

Mr. Brand: Three.

Mr. Thurber: I mean the two $200,000.00 mortgages.

Mr. Brand: The same form practically as the other two.

Mr. Thurber: No, they are not.

Mr. Stanley: In that event, you better leave it to the mortgage rather than depend on memory.

Mr. Thurber: That is all. Thank you.

(Sgd.) Jno. J. Barlum.

FRED VAN ZANDT, being by said Orrin C. Jones, notary public, first duly cautioned and sworn to testify the whole truth, deposed and said as follows:

Direct examination.

By Mr. Thurber:

Mr. Thurber: Let the record show that Fred Van Zandt's testimony is taken as a matter of convenience at this time.

Mr. Brand: Yes.

Mr. Stanley: We can say: It is stipulated by all proctors [fol. 217] that the testimony of Mr. Van Zandt may be taken on behalf of the libelants under the same conditions that the prior testimony was taken.

Mr. Brand: I am adding his name to the stipulation. That takes care of that.

By Mr. Thurber:

Q. Your name is Fred Van Zandt?

A. It is.

Q. And you are in the trust mortgage department of the Detroit Trust Company?

A. I am.

Q. In your capacity as such, are you familiar with the two mortgages involved in this litigation?

A. Yes, sir.

Q. Have you checked the records and made the computations to date, and can you state what is due under these mortgages as of today, which is June 28th?

A. I can.

Q. Will you specify the amounts and items so that we can take it down, principal, interest, insurance and any other items; first on the Thomas Barlum?

A. As to the Thomas Barlum: On February 1, 1931, bonds matured in the amount of $25,000.00 and became due and payable. The interest on those bonds from February 1, 1931, to June 28th, 1932, is $2112.32.

On May 12, 1931, the remainder of the bonds, $175,000.00 in amount, were declared due and payable. The interest on those bonds from February 1, 1931, to June 28th, 1932, is $14,787.50.

We have advanced from time to time, for insurance on the vessel heretofore, $1240.00.

Q. Is that for port risk insurance?

A. Port risk insurance, protection and indemnity.

[fol. 218] Accrued interest on that item from the date of payment until today is $23.33.

Today we made a payment of additional insurance of $426.00, on which there is no accrued interest.

There is one annual trustee's fee due in the amount of $200.00. That was due on February 1, 1932.

That is a total of $218,789.21.

Q. You have computed no interest on the trustee's fee?

A. No interest, no.

Q. That is the regular fee paid annually under the mortgage?

A. Yes.

Q. Which has heretofore been paid every year by the Steamship Company?

A. It has.

Mr. Thurber: Mr. Brand, do you wish to have the canceled vouchers submitted to show the payment of these insurance premiums?

Mr. Brand: No, if you show me the details of the item of $1240.06 and the others.

By Mr. Thurber:

Q. Have you got those items? Will you get the items making up the premiums of insurance paid on the Thomas Barlum?

A. Payment on January 26th, 1932, to William Sumner in the amount of $814.06; to payment of premium on port risk insurance covering S. S. Thomas Barlum from December 27, 1931, to April 27, 1932, that is four months, at $251.65 per month, less a credit of $24.78, less a credit or charge for P. & I., for storage of grain at Buffalo in October of 1930.

Q. Making a total of $1240.00?

A. No, $814.06.

[fol. 219] Now, the second item is payment on May 17th, 1932, to William W. Sumner, insurance, on the S. S. Thomas Barlum from April 28th, 1932, midnight, to June 28th, 1932, at midnight as follows: Port risk, P. & I., $402.00, and $24.00, total $426.00. Those two items make the total.

There is one more item, $426.00, paid today, which is exactly similar to the one paid on May 17th, except it runs from June 28th at midnight to August 28th, 1932.

Q. Have you made a similar computation covering these same items to figure what is due as of July 14th, 1932?

A. You mean as to these insurance items?

Q. No, as to what is due, including insurance, all items under the Thomas Barlum mortgage as of July 14th?

A. Yes. I made the notation but I don't have it here.

Mr. Brand: Well, we can compute that. What rate of interest are you charging?

A. 6.

By Mr. Thurber:

Q. Have you made a similar computation on the Steamer John J. Barlum under your mortgage?

A. I have.

Q. Will you give the figures on that?

A. December 15th, 1930, bonds became due in the amount of $50,000.00 and were unpaid. Interest on those bonds from December 15th, 1930, to June 28th, 1932, is $3608.29.

The remainder of the bonds, $150,000.00 in amount, were declared due and payable on May 12th, 1931. Interest on those bonds from December 15th, 1930, to June 28, 1932, is [fol. 220] $13,825.00. Insurance advanced prior to the one made today is $4965.94. Accrued interest on those items until today is $189.28. Insurance item paid today $426.00.

Trustee's annual fee due December 15, 1931, $200.00. That is a total of $223,214.51.

Q. That computation is made without compounding the interest?

A. That is straight interest.

Q. Straight interest?

A. Yes.

Q. And that is straight interest figured as of to-day?
A. As of today.
Q. At 6 per cent?
A. Yes, sir.

(Sgd.) Fred Van Zandt.

(Certified and returned by notary.)

[fol. 221] CLAIMANT'S EXHIBIT 1

Detroit Trust Company

Detroit, Michigan,
December 22, 1924.

Trust 3328

John J. Barlum, President, Barlum Steamship Company, c/o American State Bank, Detroit, Michigan.

DEAR MR. BARLUM: We acknowledge receipt of the mortgage of your Company on the steamer "Thomas Barlum" executed as of December 1, 1924, in duplicate.

We have accordingly filed the mortgage today for record in the office of the Collector of Customs, Port of Detroit, and take pleasure in handing you herewith our Detroit draft for $100,350 being the proceeds of the notes secured by the mortgage, together with interest to date at 6%.

We have delivered to the Marine Clerk the following:

1. Original mortgage, which will be recorded and returned to us for our files.

2. One copy of the mortgage, which will be certified by the Marine Clerk and returned to you.

3. One copy of the mortgage, which will be certified by the Marine Clerk and delivered to the mortgagor to be placed on board the ship.

4. One copy of the mortgage, which will be retained by [fol. 222] the Marine Clerk to avoid the necessity of copying the entire mortgage in his records.

5. Ship's Enrollment Certificate, which will have a rider attached to show the mortgage and will then be returned to you.

The enclosed check is computed as follows:

$100,000 par value of notes at par	$100,000
Accrued interest 6%, December 1 to 22nd	350
	$100,350

Will you be kind enough to send us check for expenses in the matter according to our agreement as follows:

Cost of recording	$34.60
Attorneys' charges, including disbursements	151.60
Trustee's fees	100.00
	$286.20

We regret very much that it has taken so long to close the transaction, the delay being apparently, however, beyond anyone's control.

Trusting that the matter has been taken care of to your entire satisfaction and assuring you of our pleasure in making the loan, we remain,

Yours very truly, (Signed) L. K. Butler, Vice-President.

LKB. enc.

[fol. 223] CLAIMANT'S EXHIBIT 3

Detroit Trust Company

Detroit, Michigan,
January 28th, 1927.

John J. Barlum, President, Barlum Steamship Company, c/o American State Bank, Detroit, Michigan.

DEAR MR. BARLUM: Following our conversation of a few days ago we take pleasure in saying to you that we will purchase an issue of notes in accordance with your request on the following terms and conditions:

Maker—To be the Barlum Steamship Company, a Michigan Corporation.

Amount—$75,000.

Date—February 15th, 1927, or some other date about that time if more convenient to you.

Maturities: $25,000 at the end of the first, second and third years.

Interest rate—6% payable semi-annually.

Redemption in whole or in part on any interest date at 102 and interest in inverse numerical order.

Mortgagor to agree to pay the Federal Normal Income Tax up to 2%.

Notes to be guaranteed by John J. Barlum individually.

Notes to be secured by first mortgage on the Steamer "Thomas Barlum."

Form of note, mortgage and other papers to be drawn by our attorneys and to be satisfactory to them and to us [fol. 224] following the form of the mortgage we now hold on the same steamer.

Title to the steamer to be satisfactory to our attorneys on examination of duly certified abstract.

The attorneys' charges, recording charges, if any, revenue stamps and usual trustees fees to be paid by you. By usual trustees fees we mean $1.00 per $1000 par value for certifying the notes, the annual fee of $50 payable at the end of each year for paying interest and principal, attending to insurance, et cetera, and a closing fee of $25 payable when the last of the notes are finally canceled and the mortgage discharged.

It is understood that the $50,000 par value of the first mortgage notes now outstanding secured by mortgage to the Detroit Trust Company as trustee bearing date December 1st, 1924, will be redeemed in full under the redemption provisions of that mortgage so that the new mortgage above outlined will be an absolute first lien on the steamer.

To save the expense of having the notes printed we will issue fifteen typewritten notes of $5000 each—that being the same plan adopted in the previous case, and we will pay you par with accrued interest for the notes.

If the above and foregoing meets with your approval will you please be good enough to so signify by signing the carbon copy of this letter, returning it to us for our files.

We believe that with the information we now have in connection with the previous issue our attorneys will be [fol. 225] able to promptly prepare all the necessary papers as soon as we have your instructions.

Under the present mortgage the next date on which the outstanding notes could be redeemed is June 1st, 1927. However, as all of the notes are in our control we can bring

about the presentation of the same for payment at any time without waiting for the next redemption date. We can take up the notes as just stated at any time at the redemption rate with interest only to that date.

Thanking you and trusting that the above is entirely in accordance with your wishes, we remain,

Yours respectfully, (Signed) L. K. Butler, Vice-President.

LKB. encl.

[fol. 226] CLAIMANT'S EXHIBIT 4

Trust No. 4279

Barlum Steamship Company

Statement of Account Proceeds $75,000 of Notes Dated February 15, 1927

Receipts:		
Proceeds of $75,000.00 par value of notes		$75,000.00
Accrued interest 6% Feb. 15, 1927 to March 21, 1927		450.00
		$75,450.00
Disbursements:		
Balance of notes due under mortgage dated Dec. 1, 1924	$50,000.00	
2% Premium	1,000.00	
6% Interest on $50,000.00 from Dec. 1, 1926 to March 21, 1927	916.65	
Trustee's closing fee	25.00	
Three months proportion of $100.00 Trustee's annual fee	25.00	
Trustee's certifying fee	75.00	
Collector of Customs—recording of mortgages	40.20	
Miller, Canfield, Paddock & Stone attorney's charges	155.00	
Remitted to Barlum Steamship Company net proceeds	23,213.15	
		$75,450.00

Dated at Detroit, Michigan, March 21, 1927.

[fol. 227] CLAIMANT'S EXHIBIT 7

Detroit and Security Trust Company

Detroit, February 21, 1929.

Mr. John J. Barlum, Care American State Bank, Detroit, Michigan.

DEAR MR. BARLUM: Confirming our conversation of this morning, we take pleasure in advising you that we will be glad to purchase an issue of bonds on the following terms and conditions:

Maker—To be the Barlum Steamship Company.

Amount—$200,000.

Date—March 1st, 1929.

Maturities—$25,000 at a date to be agreed upon near the close of the navigating season of 1930 and $25,000 each year thereafter for a total of four maturities and the balance, viz., $100,000 as the fifth annual maturity.

Interest rate—6 per cent payable semi-annually.

Redemption in whole or in part on any interest date at 100½ in numerical order.

Mortgagor to agree to pay the Federal Income Tax up to 2 per cent.

Bonds to be of the denomination of $1000 and numbered from 1 to 200 and to be guaranteed by John J. Barlum individually.

Bonds to be secured by first prior preference mortgage on the steamer "Thomas Barlum."

Form of bond, mortgage and other papers to be drawn by our attorneys and to be satisfactory to them and to us. [fol. 228] The entire procedure and the closing of the loan to be done in a manner satisfactory to our attorneys.

Title to the steamer to be satisfactory to our attorneys on examination of whatever papers they will require.

Attorneys' charges, cost of printing the bonds and usual Trustee's fees to be paid by the mortgagor. By usual Trustee's fees we mean $1.00 per $1000 for certifying the bonds, and annual fee of $200.00 payable at the end of each year for paying interest and principal, attending to insurance, etc., and a closing fee of $50.00 payable when the last of the bonds are finally canceled and the mortgage discharged.

For the bonds so issued we will pay you at the rate of 97, that is, $970.00 for each $1000 par value with accrued interest if any.

It is understood that as a condition of the above the proceeds of the purchase of said bonds by us are to be used as follows:

To pay the note issue now outstanding secured by mortgage on the same steamer	$50,000.00
Interest on the same from February 15th to which it is now paid up to March 1st, 1929	125.00
Annual fee due the Trustee	25.00
Closing fee due the Trustee	25.00
Attorneys' charges estimated	750.00
Trustee's fee for certifying new bonds	200.00
Cost of printing new bonds estimated	100.00
To take up principal debt of John J. Barlum [fol. 229] and Thomas Barlum and Sons now held by us to the amount of	100,000.00
	$151,225.00
Balance to Steamship Company for repairs and refitting the steamers "Thomas Barlum" and "John J. Barlum" for the season of 1929	42,775.00
$200,000 par value at 97	$194,000.00

After the above is accomplished it will leave us with principal of your individual notes as follows:

One note due March 1st, 1929	$2,488.76
One note due April 1st, 1929	2,488.77
Balance to be renewed for three months	4,700.00
	$9,677.53

As collateral to this unpaid balance on your personal indebtedness we would retain the 40 shares of stock of the American State Bank which we now have with your collateral and we would surrender to you all of the stock of the Barlum Steamship Company now held by us totaling 1080 shares.

Please note that in the above we are waiving the additional interest and premium for redemption of the present

outstanding notes to which we would be entitled to their terms. We are able to do this as we still own the full $50,000 of notes.

If the above and foregoing is satisfactory to you would you be good enough to so signify by signing the carbon [fol. 230] copy of this letter so that we may proceed as rapidly as possible?

Thanking you and trusting that the suggested plan will appeal to you as being to your advantage as well as to ours, we remain.

Yours respectfully, (Signed) L. K. Butler, Lawrence K. Butler, Vice-President.

[fol. 231] CLAIMANT'S EXHIBIT 8

Statement of Proceeds of Barlum Steamship Company Loan of March 1, 1929

Receipts:			
Purchase of $200,000.00 par value bonds at 97			$194,000.00
Accrued interest March 1, 1929, to March 25, 1929			800.00
Disbursements:			
Amount necessary to take up Barlum Steamship Company bonds dated February 15, 1927:			
Principal	$50,000.00		
Accrued Int. Feb. 15 to March 25	333.33		
Closing fee	25.00		
		$50,358.33	
Trustee's certifying fee		200.00	
Attorneys' charges		750.00	
Printing		92.50	
Expenses to Mr. Massnick to Wheeling, W. Va., re closing		40.47	

Amount necessary to pay bill of Dollar Savings & Trust Co., Wheeling, West Virginia, being their services as agent and postage, registration, [fol. 232] etc		62.26	
Revenue stamps		100.00	
Michigan Securities Commission filing fee		200.00	
Amount required to take up Thomas Barlum & Sons note being principal and interest		45,510.00	
Amount necessary to take up John J. Barlum note being principal and interest		33,566.50	
Amount to apply on account of principal of John J. Barlum note	$20,745.50		
Accrued Int. to March 25th	178.00		
		20,923.50	
Amount reserved for recording and abstract charges		100.00	
Balance to Barlum Steamship Company		42,896.44	
Mar. 25, 1929		$194,800.00	$194,800.00

[fol. 233] CLAIMANT'S EXHIBIT 8-A

To Detroit and Security Trust Company, Detroit, Michigan:

GENTLEMEN: When the two hundred thousand and 00/100 dollars ($200,000.00) par value First Mortgage 6% Bonds, executed by Barlum Steamship Company, being the entire

issue dated March 1, 1929, and being bonds numbered one to two hundred (1 to 200) both inclusive, secured by mortgage of even date to the Detroit and Security Trust Company, as Trustee, have been duly certified by said Trustee, and delivered to you—

You Are Hereby Authorized and Instructed to use the proceeds of the purchase of said bonds as follows:

Pay:

Amount necessary to discharge present mortgage including interest on same from February 15, 1929.

Trustee's closing fee.

Attorneys' charges—Miller, Canfield, Paddock & Stone.

Trustee's certifying fee and closing fee.

Mortgage tax.

Revenue stamps.

Michigan Securities Commission filing fee.

Cost of printing bonds.

Recording and abstract charges.

Retain to take up principal debt of John J. Barlum and Thomas Barlum & Sons, held by us in the amount of $100,000.00.

[fol. 234] Entire balance to Barlum Steamship Company.

Barlum Steamship Company, (Sgd.) Jno. J. Barlum, President; (Sgd.) Thos. J. Barlum, Secretary.

Dated at Detroit, Michigan, March 18th, 1929.

RECITAL AS TO CLAIMANT'S EXHIBIT 9

This exhibit is a written application dated March 12, 1929, by Barlum Steamship Co. to the Michigan Securities Commission for authority to sell the $200,000 of bonds secured by the mortgage against the Steamer Thomas Barlum sought to be foreclosed in suit No. 1794. Such application was signed and verified by John J. Barlum and Thomas J. Barlum, respectively President and Secretary of applicant. Attached to and filed with the application were statements of the financial worth of applicant and of John J. Barlum, guarantor. The application states that the proceeds of the bonds are to be used to refinance.

[fol. 235] CLAIMANT'S EXHIBIT 13

December 23, 1927.

John J. Barlum, President, Barlum Steamship Company, 3705 Barlum Tower, Detroit, Michigan.

DEAR MR. BARLUM: In accordance with our several conversations we will be pleased to purchase from you an issue of bonds in accordance with the following terms and conditions:

Maker—To be the Barlum Steamship Company, a West Virginia Corporation.

Amount—$200,000.

Date—December 15, 1927..

Maturities—$50,000 payable December 15, 1930; $50,000 payable December 15, 1931; $100,000 payable December 15, 1932.

Interest rate—6 per cent payable semi-annually.

Redemption in whole or in part on any interest date at 100½ and interest in inverse numerical order.

Mortgagor—To agree to pay the Federal Normal Income Tax up to 2 per cent.

Bonds to be secured by first mortgage on the steamer "John J. Barlum."

Bonds to be guaranteed by John J. Barlum.

Form of bond, mortgage and other papers to be drawn by our attorneys and to be satisfactory to them. The mortgage is to be an absolute first lien on said steamer.

Title to the steamer to be satisfactory to our attorneys on examination of duly certified abstract.

[fol. 236] The attorneys' charges, recording charges if any, revenue stamps, cost of printing bonds, and usual trustee's fees to be paid by you. By usual trustee's fees we mean $1.00 per $1000 par value for certifying the bonds, the annual fee of $200, payable at the end of each year for paying interest and principal, attending to insurance, etc., and a closing fee of $50.00 payable when the last of the bonds are finally canceled and the mortgage discharged.

For the bonds we will pay you $98.00 and accrued interest, i. e., $980.00 for each $1000 par value, plus accrued interest, if any, from the date of the bonds to the date of payment by us therefor.

If the above and foregoing meets with your approval will you please be good enough to so signify by signing the carbon copy of this letter, returning it to us for our files.

Very truly yours, McPherson Browning, President.

The above and foregoing is satisfactory and we agree to sell the bonds on the terms and conditions mentioned.

Barlum Steamship Co., by Jno. J. Barlum.

[fol. 237] RECITAL AS TO CLAIMANT'S EXHIBIT 14

This exhibit is a written application dated January 14, 1928, by Barlum Steamship Co. to the Michigan Securities Commission for authority to sell the $200,000 of bonds secured by the mortgage against the Steamer John J. Barlum sought to be foreclosed in suit No. 1795. Such application was signed and verified by John J. Barlum and Thomas J. Barlum, respectively President and Secretary of applicant. Attached to and filed with the application were statements of the financial worth of applicant and of John J. Barlum, guarantor.

[fol. 238] CLAIMANT'S EXHIBIT 15

To Detroit Trust Company, Detroit, Michigan:

GENTLEMEN: When the two hundred thousand & 00/100 dollars ($200,000.00) par value First Mortgage 6% Bonds, executed by Barlum Steamship Company, being the entire issue dated December 15, 1927, and being bonds number one to two hundred (1 to 200) both inclusive, secured by mortgage of even date to the Detroit Trust Company, as Trustee, have been duly certified by said Trustee, and delivered to you—

You Are Hereby Authorized and Instructed to use the proceeds of the purchase of said bonds as follows:

Pay:

Amount to cover bonds $50,000.00 and coupons $32,-281.25, due January 1, 1928, from John J. Barlum, with interest from Jan. 1st to date of payment.

Retain $10,000.00 to be applied on John J. Barlum note.
Revenue stamps.
Charge of Miller, Canfield, Paddock & Stone.
Recording charges.
Cost of printing of bonds.
Trustee's certifying fee.
Expenses of Thomas J. Barlum and N. C. Mente to Wheeling re delivery of mortgage and temporary note.
[fol. 239] Entire balance to Barlum Steamship Company.

Barlum Steamship Company, (Sgd.) Jno. J. Barlum, President; (Sgd.) Thos. J. Barlum, Secretary.

Dated at Detroit, Michigan, Jan. 7, 1928.

[fol. 240]

CLAIMANT'S EXHIBIT 15-A

Str. John J. Barlum

Proceeds:		
1/10/28.		
200,000 at 98		196,000.00
Acc. Int.		733.33
		196,733.33
Revenue	100.00	
1/7.		
Recording	54.40	
Attys	830.00	
Print	107.50	
Trip Wheeling	76.50	
Cert. fee	200.00	
Securities fee	200.00	
Postage Ins	12.26	
Pay a/c J. J. Barlum note 10,000.00 1/7/28 on J. J. personal		
Pay J. J. Barlum bonds due 1/1/28	50,000.00	
Pay J. J. Barlum coupons 1/1/28	32,281.25	
Pay J. J. Barlum Int. on past due	82.13	
To B. S. Co. bal. net pro.	102,801.55	
To Wheeling bank—fees	62.26	
	196,807.85	74.52

[fol. 241] LIBELANT'S EXHIBIT 16

Bond Department, Detroit and Security Trust Company, Detroit

$13,000,000 Invested Capital

Telephone Randolph 5670

We own and offer subject to prior sale:

$200,000

Barlum Steamship Company First Mortgage 6% Gold Bonds

Dated March 1st, 1929. Due Serially

Coupon bonds in $1000 denomination. Redeemable in numerical order as a whole or in part on any interest date on four weeks' notice at 100½. Interest payable without deduction for normal Federal Income Tax up to 2 per cent. Principal and semi-annual interest (February 1st and August 1st) payable at the office of the Detroit and Security Trust Company, Detroit, Michigan, Trustee.

Security: These bonds are the direct obligation of the Barlum Steamship Company and are secured by a closed first mortgage to the Detroit and Security Trust Company, Trustee, on the steel steamer "Thomas Barlum," described and appraised as follows:

Length—480 feet.
Depth—30 feet.
Beam—52.2 feet.
Gross tonnage—5752 tons.
Net tonnage—4485 tons.
Appraised value (minimum), $400,000.

[fol. 242] The Barlum Steamship Company is engaged in the carrying of freight on the Great Lakes. It also owns and operates the "John J. Barlum," a steel steamer of approximately the same size. The officers of the Company are Mr. John J. Barlum, President and Treasurer; and Mr. Thomas Barlum, Secretary.

Guarantee: These bonds are personally guaranteed, both as to principal and interest by Mr. John J. Barlum, President of the Company.

Insurance: The vessel is covered with the usual marine insurance with loss clause payable to the Detroit and Security Trust Company, Trustee.

Legality: Legal matters in connection with this issue have been approved by Messrs. Miller, Canfield, Paddock and Stone, Detroit, Michigan.

Maturities

$25,000 due February 1st, 1931.
$25,000 due February 1st, 1932.
$25,000 due February 1st, 1933.
$25,000 due February 1st, 1934.
$100,000 due February 1st, 1935.

Price—100.

[fol. 243] LIBELANT'S EXHIBIT 17

First Detroit Company, Incorporated, 735 Griswold Street, Detroit

Investment Unit—Detroit Bankers Company

Peoples Wayne County Bank

First National Bank in Detroit

Detroit and Security Trust Company

We own and offer subject to prior sale:

$200,000

Barlum Steamship Company

First Mortgage 6% Gold Bonds

Dated December 15, 1927. Due Serially

Coupon bonds of $1000 denomination each. Interest payable June 15th and December 15th. Subject to redemption in inverse numerical order on any interest date on four weeks' notice at 100½ and accrued interest. Both

interest and principal payable at the office of Detroit Trust Company, Trustee.

Security: These bonds are the direct obligation of the Barlum Steamship Company and are secured by a closed first mortgage to Detroit Trust Company, Trustee, on the steel steamer "John J. Barlum," described and appraised as follows:

Length—504 feet.
Beam—54 feet.
Depth—30 feet.
Gross tonnage—6419 tons.
Net tonnage—4924 tons.
Appraised value as of January 1, 1928 (minimum), $400,000.

[fol. 244] The Barlum Steamship Company also owns the "Thomas Barlum," a steel steamer of approximately the same size. It is engaged in the carrying of freight on the Great Lakes. The officers of the Company are Mr. John J. Barlum, President and Treasurer; and Mr. Thomas Barlum, Secretary.

Guarantee: The bonds are personally guaranteed as to principal and interest by Mr. John J. Barlum, President of the Company, who has a net personal worth greatly in excess of this bond issue. Mr. Barlum is prominent in Detroit banking, shipping and real estate circles, being President of the American State Bank, of Thomas Barlum Sons, and of the White Star Transportation Line. He also owns valuable down town real estate in the city of Detroit.

Insurance: The vessel is fully insured, with loss clause payable to Detroit Trust Company, Trustee.

Legality: Legal matters in connection with this issue have been approved by Messrs. Miller, Canfield, Paddock and Stone, Detroit, Michigan.

The Company agrees to pay the Normal Federal Income Tax not to exceed 2 per cent.

Maturities

$50,000 due Dec. 15, 1930.
$50,000 due Dec. 15, 1931.
$100,000 due Dec. 15, 1932.

[fol. 245] RECITAL AS TO CLAIMANT'S EXHIBITS 18, 18-A, 18-B, 18-C, 18-D, 18-E AND 18-F

These exhibits consist of asset and liability statements of Barlum Realty Co. and Barlum Steamship Co., December 31, 1925, December 31, 1926, Cadillac Square Improvement Co. May 1, 1927, and certain memos.

[fol. 246] CLAIMANT'S EXHIBIT 19

Bond Issue at Detroit Trust Co.

Str. "Thomas Barlum"

$200,000.00

March 1st, 1929

1929, March 25.—Received from Detroit Trust Co. check for $42,896.44, which was balance of check account bonds on Str. Thomas Barlum, and was deposited in bank account of Str. John J. Barlum, from which account checks for $20,400 were issued and deposited to the bank account of the Str. Thomas Barlum.

Schedule of checks paid out in each boat account for this amount is attached.

Bank Statement

Str. Thomas Barlum

American State Bank

March		
1	Balance	$5.17
4	Deposit	1,500.00
4	Deposit	200.00
4	Deposit	1,500.00
13	Deposit	365.00
19	Deposit	55.00
23	Deposit	1,513.73
		$5,138.90
	Overdraft	719.49
		$5,858.39

[fol. 247]

1929 March		
4	Checks outstanding	$3,189.29
4	Buffalo Dry Dock Co	220.43
5	American State Bank	12.50
7	Geo. W. Stark	1.00
11	American State Bank	126.07
12	American State Bank	20.00
14	Louis Moreau	75.00
	Str. John J. Barlum	50.00
18	Boland & Cornelius	1,946.60
	Str. John J. Barlum	200.00
19	Postal Teleg. Co	5.00
	American State Bank	12.50
		$5,858.39

1929 March		
27	Dep. check from Str. JJ Barlum account	$20,000.00
30	Dep. check from Str. JJ Barlum account	400.00
		$20,400.00
	Overdraft	359.27
		$20,759.27

1929 March		
25	Overdraft	$719.49
25	Lake Carriers Assn	348.12
25	Pittsburg Coal Co	8,394.75
25	Metropolitan Caus	248.43

[fol. 248]

25	Mullen Coal Co	840.00
25	Lake Shippers Clear	514.20
25	Rollins Burdick Hunter Company	7,292.90
25	R. Alleman	37.34
25	F. A. McIntosh	62.50
25	J. W. Wolvin	20.00
27	American State Bank	20.00
26	Capt. R. A. Cain	400.00
26	H. Wellhausen	236.67
26	Louis Moreau	204.71

1929 March			
26	L. J. Manion		1,007.55
26	Thos. Garlick		236.56
26	Leonard Endries		176.05
			$20,759.27

Statement Bank Account, Str. "John J. Barlum," National Bank of Commerce

1929 March			
1	Balance		$104.54
4	Deposit		1,726.13
15	Deposit		50.00
25	Deposit		200.00
			$2,080.67
1929 Feb.			
9	Outstanding check	$	26.50
March			
4	Buffalo Dry Dock Co		233.25
4	Str. Thos. Barlum		1,500.00
14	Ernst Thompson		75.00
23	Boland & Cornelius		175.00
			$2,009.75
[fol. 249]			
	Balance in bank		70.92
			$2,080.67
1929 March			
25	Balance		$70.92
25	Deposit—Bal. of check a/c bonds Str. Thos. Barlum		42,896.44
			$42,967.36

1929 March		
25	Rollins Burdick Hunter Co	$7,725.86
25	Lake Carriers Assn	387.64
25	Lake Ship. Clear	752.80
25	Metropolitan Caus	183.79
25	Mullen Coal Co.	1,050.00
25	Pittsburg Coal Co	9,790.25
26	Boland & Cornelius	575.19
26	J. W. Wolvin	30.00
26	Ernst Thompson	75.00
26	Wm. Parry	528.00
26	W. C. Houston	1,191.85
27	Str. Thos. Barlum	20,000.00
30	Interlake SS Co	46.07
30	Electric Laundry	5.80
30	Hutchins Laundry	30.10
30	American Ship Bldg	173.43
30	Str. Thos. Barlum	400.00
		$42,945.78
	Balance in bank	21.58
		$43,967.36

[fol. 250] CLAIMANT'S EXHIBIT 22

Stockholders Barlum Steamship Company

1700 Str. Thomas Barlum	1927	1928	1929
Thos. J. Barlum			20
R. Lawson	10	same	
O. Dustin	54		54
Thos. Dolan	30		30
A. R. Lee	90		90
Charlotte Barlum Gotfredson	8		8
Veola Barlum McDonnell	4		4
Mrs. John J. Barlum	30		30
Louis P. Barlum	60		80
Thomas Barlum Estate	60		
John J. Barlum	1239		1329
Rosamond Dustin	30		30
Mrs. Thos. J. Barlum	25		25
Frank B. Seelemire	30		
Minnie A. Seelemire	30		

	1500 Str. John J. Barlum		
John J. Barlum	1322	same	1322
Louis P. Barlum	50		50
Veola Barlum McDonnell	6		6
Charlotte Barlum Gotfredson	12		12
A. R. Lee	50		50
Thomas Dolan	10		10
Rosamond Dustin	10		10
Mrs. John J. Barlum	20		20
Thomas Barlum			
Mrs. Thos. J. Barlum	20		20

[fol. 251] LIBELANT'S EXHIBIT 23

Barlum Steamship Company

Consent of Stockholders to Mortgage on S. S. "Thomas Barlum"

We, the undersigned, being the holders of the number of shares of the capital stock of the Barlum Steamship Company, a West Virginia corporation, set opposite our respective signatures hereto, do hereby consent to and authorize the making of a mortgage by said Barlum Steamship Company to Detroit and Security Trust Company, as trustee, said mortgage to be dated March 1, 1929, and to secure the payment of two hundred thousand dollars ($200,000.00) of first and preferred mortgage bonds of the said Barlum Steamship Company of even date therewith, and of the following amounts, numbers and dates of maturity:

Number	Amount	Maturity
1– 25	$25,000.00	February 1, 1931
26– 50	25,000.00	February 1, 1932
51– 75	25,000.00	February 1, 1933
76–100	25,000.00	February 1, 1934
101–200	100,000.00	February 1, 1935

Said bonds to bear interest at the rate of six per centum (6%) per annum, payable semi-annually on the first days of August and February in each year at the office of said

Detroit and Security Trust Company; the said Barlum Steamship Company to also pay the normal Federal Income Tax not in excess of two per centum (2%) per annum upon the interest of said bonds and to have the right to [fol. 252] pay the same in whole or in part, according to their numerical order, on any semi-annual interest date, by payment of the principal amount thereof and a premium of one-half of one per centum (½%) thereon, together with interest on said bonds to date of payment; the terms, conditions, provisions and form of said bonds and mortgage to be such as shall be approved by the directors of said Barlum Steamship Company, or by its duly delegated officer or officers; said mortgage to convey and cover the S. S. "Thomas Barlum" of which the Barlum Steamship Company is the sole owner.

In witness whereof, we hereunto subscribe our names and shares in said steamship company, this 7th day of March, 1929.

Stockholders	Number of shares
(Signed) Jno. J. Barlum	2561
(Signed) Louis P. Barlum	60
(Signed) Thos. J. Barlum	20

STATE OF MICHIGAN,
County of Wayne, ss:

I, Thomas J. Barlum, of Detroit, Michigan, do hereby certify under the seal of the Barlum Steamship Company, a corporation organized and existing under the laws of West Virginia, and sole owner of the S. S. "Thomas Barlum," that I am secretary of said company, that the outstanding capital stock of said company consists of 3200 shares of the par value of $100.00 each, and that the persons who have signed the foregoing consent to mortgage [fol. 253] are the holders of more than two-thirds (⅔) of the total outstanding capital stock of said company.

In Witness Whereof, I have hereunto subscribed my name and affixed the corporate seal of the said Barlum Steamship Company this 7th day of March, 1929.

(Signed) Thos. J. Barlum, Secretary. (Corporate Seal.)

LIBELANT'S EXHIBIT 24

Barlum Steamship Company

Certified Copy Resolution of Directors' Mortgage on S. S. "Thomas Barlum"

STATE OF MICHIGAN,
County of Wayne, ss:

I, Thomas J. Barlum, of Detroit, Michigan, do hereby certify under the seal of the Barlum Steamship Company, a corporation organized and existing under the laws of West Virginia, and sole owner of all of the S. S. "Thomas Barlum," that I am the secretary of said company, and that at a meeting of the board of directors of said company, duly called and held on the 7th day of March, 1929, a resolution was duly passed, of which a true and complete copy is as follows:

"Whereas, it is necessary to borrow the sum of two hundred thousand dollars ($200,000.00) for the use and [fol. 254] benefit of the S. S. 'Thomas Barlum' and said amount may be obtained from the Detroit and Security Trust Company, Trustee, on the security of a preferred mortgage on said steamship, and the personal guaranty of John J. Barlum.

Now, Therefore, be it resolved, that this corporation borrow said sum of two hundred thousand dollars ($200,000.00) from said Detroit and Security Trust Company, Trustee; that it make, issue and deliver therefor its two hundred (200) preferred first mortgage gold bonds dated March 1, 1929, for one thousand dollars ($1000.00) each, due as follows:

No.	Amount	Maturity
1– 25	$25,000.00	February 1, 1931
26– 50	25,000.00	February 1, 1932
51– 75	25,000.00	February 1, 1933
76–100	25,000.00	February 1, 1934
101–200	100,000.00	February 1, 1935

with interest at the rate of six per centum (6%) per annum, payable semi-annually on August 1 and February 1 of each year until paid, at the office of said Detroit and Security Trust Company, with the privilege of redeeming

said issue in whole or in part, at 100½, with interest, in the numerical order of said bonds; that the payment of said bonds be secured by a first preferred mortgage on said S. S. 'Thomas Barlum' to said Trustee.

Be It Further Resolved, that the president and secretary of this corporation be, and they hereby are, authorized and directed to execute and deliver said bonds in the name of this corporation, and to also make, execute and [fol. 255] deliver to said Detroit and Security Trust Company, Trustee, said first preferred mortgage in the name and under the seal of this corporation.

And Be It Further Resolved, that said bonds and mortgage made in such form and language and containing such provisions and conditions as shall be approved by the president of this corporation and by said Trustee, and that their execution and acceptance of the same shall be conclusive evidence of the approval thereof, by and in behalf of this corporation.

And Further, that the president of this corporation be, and he hereby is, authorized and directed to make, execute and deliver the statutory affidavits of good faith in connection with the mortgage aforesaid."

(Signed) Thos. J. Barlum, Secty.

LIBELANT'S EXHIBIT 25

Barlum Steamship Company

Consent of Stockholders to Mortgage on S. S. "John J. Barlum"

We, the undersigned, being the holders of the number of shares of the capital stock of the Barlum Steamship Company, a West Virginia corporation, set opposite our respective signatures hereto, do hereby consent to and authorize the making of a mortgage by said Barlum Steamship Company to Detroit Trust Company, as Trustee, said mortgage to be dated December 15, 1927, and to secure the [fol. 256] payment of two hundred thousand dollars ($200,000.00) of first mortgage bonds of the said Barlum Steamship Company of even date therewith, and of the following amounts, numbers and dates of maturity:

No.	Amount	Maturity
1– 50	$50,000.00	December 15, 1930
51–100	50,000.00	December 15, 1931
101–150	50,000.00	December 15, 1932
151–200	50,000.00	December 15, 1933

Said bonds to bear interest at the rate of six per centum (6%) per annum, payable semi-annually on the fifteenth days of June and December in each year, at the office of said Detroit Trust Company; the said Barlum Steamship Company to also pay the normal Federal Income Tax not in excess of two per centum (2%) per annum upon the interest of said bonds and to have the right to pay the same in whole or in part, according to their inverse numerical order, on any semi-annual interest date, by payment of the principal amount thereof and a premium of two per centum (2%) thereon, together with interest on said bonds to date of payment; the terms, conditions, provisions and form of said bonds and mortgage to be such as shall be approved by the directors of said Barlum Steamship Company, or by its duly delegated officer or officers; said mortgage to convey and cover the S. S. "John J. Barlum" of which the Barlum Steamship Company is the sole owner.

We do hereby further consent to and authorize the execution and delivery of a temporary note in the principal [fol. 257] amount of two hundred thousand dollars ($200,000.00), to bear interest at the rate of six per centum (6%) per annum, payable semi-annually, and secured by the above described mortgage, such note to be executed and delivered by the president and secretary of the Barlum Steamship Company, and to be in form approved by said officers, and said note to be surrendered to the maker and canceled upon the delivery of the bonds as above provided.

In Witness Whereof, we hereunto subscribe our names and shares in said Steamship Company, this 4th day of January, 1928.

Stockholders		No. of shares
(Signed)	Jno. J. Barlum	2561
(Signed)	Thos. J. Barlum	45
(Signed)	Louis P. Barlum	110

STATE OF MICHIGAN,
County of Wayne, ss:

I, Thomas J. Barlum, of Detroit, Michigan, do hereby certify under the seal of the Barlum Steamship Company, a corporation organized and existing under the laws of West Virginia, and sole owner of the S. S. "John J. Barlum," that I am secretary of said company, that the outstanding capital stock of said company consists of 3200 shares of the par value of $100.00 each, and that the persons who have signed the foregoing consent to mortgage are the holders of more than two-thirds (⅔) of the total outstanding capital stock of said company.

In Witness Whereof, I have hereunto subscribed my [fol. 258] name and affixed the corporate seal of the said Barlum Steamship Company this 4th day of January, 1928.

(Signed) Thos. J. Barlum, Secretary. (Corporate Seal.)

LIBELANT'S EXHIBIT 26

Barlum Steamship Company

Certified Copy Resolution of Directors

Mortgage on S. S. "John J. Barlum"

STATE OF MICHIGAN,
County of Wayne, ss:

I, Thomas J. Barlum, of Detroit, Michigan, do hereby certify under the seal of the Barlum Steamship Company, a corporation organized and existing under the laws of West Virginia, and sole owner of the S. S. "John J. Barlum," that I am the secretary of said company, and that at a meeting of the board of directors of said company, duly called and held on the 4th day of January 1928, a resolution was duly passed, of which a true and complete copy is as follows:

"Whereas, it is necessary to borrow the sum of two hundred thousand dollars ($200,000.00) for the use and benefit of the S. S. 'John J. Barlum,' and said amount may be obtained from the Detroit Trust Company, Trustee, on the

[fol. 259] security of a preferred mortgage on said steamship, and the personal guaranty of John J. Barlum.

Now, Therefore, be it resolved, that this corporation borrow said sum of two hundred thousand dollars ($200,000.00) from said Detroit Trust Company, Trustee; that it make, issue and deliver therefor its two hundred (200) preferred first mortgage gold bonds dated December 15, 1927, for one thousand dollars ($1000.00) each, due as follows:

No.	Amount	Maturity
1- 50	$50,000.00	December 15, 1930
51-100	50,000.00	December 15, 1931
101-150	50,000.00	December 15, 1932
151-200	50,000.00	December 15, 1933

with interest at the rate of six per centum (6%) per annum, payable semi-annually on June 15 and December 15 of each year until paid, at the office of said Detroit Trust Company, with the privilege of redeeming said issue in whole or in part, at 100½, with interest, in the inverse numerical order of said bonds; that the payment of said bonds be secured by a first preferred mortgage on said S. S. 'John J. Barlum' to said Trustee.

Be It Further Resolved, that the president and secretary of this corporation be, and they hereby are authorized and directed to execute and deliver said bonds in the name of this corporation, and to also make, execute and deliver to said Detroit Trust Company, Trustee, said first preferred mortgage in the name and under the seal of this corporation.

[fol. 260] And Be It Further Resolved, that pending the delivery of said bonds, the president and secretary of this corporation be and they hereby are authorized and directed to execute and deliver in the name of this corporation, a promissory note for the principal amount of two hundred thousand dollars ($200,000.00), to bear interest at six per centum (6%) per annum, payable semi-annually and to be secured by said mortgage; said note to be in such form as may be approved by the president and secretary and to be surrendered to maker upon delivery of the bonds, in conformity with these resolutions.

And Be It Further Resolved, that said bonds and mortgage made in such form and language and containing such provisions and conditions as shall be approved by the president of this corporation and by said Trustee, and that their execution and acceptance of the same shall be conclusive evidence of the approval thereof, by and in behalf of this corporation.

And Further, that the president of this corporation be, and he hereby is, authorized and directed to make, execute and deliver the statutory affidavits of good faith in connection with the mortgage aforesaid."

(Signed) Thos. J. Barlum, Secty. (Corporate Seal.)

[fol. 261] RECITAL AS TO LIBELANT'S EXHIBIT 27

This exhibit is the original mortgage attached as Exhibit A to Libel in Suit No. 1794.

RECITAL AS TO LIBELANT'S EXHIBIT 28

This exhibit is the original mortgage attached as Exhibit A to Libel in Suit No. 1795.

LIBELANT'S EXHIBIT 29

Certificate of Ownership of Vessel

Department of Commerce, Bureau of Navigation

United States Customs Service, Port of Detroit, Michigan, Collector's Office, June 28, 1932

I hereby certify that, according to the records of this office, the steam screw called the John J. Barlum (206279) of Detroit, Michigan, 6419 gross and 4924 net was enrolled (P. E. No. 12) at this office March 15, 1927, at which time the following were her owners, viz:

Barlum Steamship Company, 2716 Grand River Ave., Detroit, Michigan, sole owner.

Note: Preferred Trust Mortgage dated December 15, 1927, in the amount of $200,000.00 with interest at 6% per [fol. 262] annum from Barlum Steamship Company to Detriot Trust Company, Trustees, received for record in this office under date of January 6, 1928, at 11:30 A. M. and recorded in Book "V" of Preferred Mortgages, page 53.

and that there is no encumbrance, mortgage or lien on record against said vessel in this office, other than the above preferred trust mortgage.

Given under my hand and seal of office this 28th day of June, 1932.

(Signed) F. J. Heffner, Acting Deputy Collector.
(Seal—District of Michigan, Collector of Customs, Port of Detroit.)

LIBELANT'S EXHIBIT 30

Certificate of Ownership of Vessel

Department of Commerce, Bureau of Navigation

United States Customs Service, Port of Detroit, Michigan, Collector's Office, June 28, 1932

I hereby certify that, according to the records of this office, the steam screw called the Thomas Barlum (204798) of Detroit, Michigan, 5752 gross and 4485 net was enrolled (P. E. No. 11) at this office March 15, 1927, at which time the following were here owners, viz.:

[fol. 263] Barlum Steamship Company, 2716 Grand River Ave., Detroit, Michigan, sole owner.

Note: Preferred Trust Mortgage, dated March 1, 1929, in the amount of $200,000.00 with interest at 6% per annum, from Barlum Steamship Company to Detroit and Security Trust Company, Trustee, received for record in this office under date of March 25, 1929, at 12:49 P. M. and recorded in Book of Preferred Mortgages "V," page 66.

and that there is no encumbrance, mortgage or lien on record against said vessel in this office, other than the above preferred trust mortgage.

Given under my hand and seal of office this 28th day of June, 1932.

(Signed) F. J. Heffner, Acting Deputy Collector.
(Seal—District of Michigan, Collector of Customs, Port of Detroit.)

[fol. 264] In United States District Court

Opinion, March 9, 1933, Suits Nos. 1794 and 1795

Adler, District Judge:

These actions were brought to foreclose in admiralty two preferred mortgages, executed and delivered by the Barlum Steamship Company, covering the Steamers "Thomas Barlum" and "John J. Barlum" under the provisions of the Ship Mortgage Act, Chapter 25, Title 46, Section 922, and succeeding sections, of the United States Code Annotated. Each of the mortgages is for $200,000.00.

The two actions are identical except for the names of the vessels and the disposition of the amounts involved. Upon the filing of the libels, the mortgagor appeared as claimant and filed exceptions in each case. The exceptions questioned the jurisdiction of the United States District Court upon the ground that Congress had no power under the Constitution to increase and extend the admiralty and maritime jurisdiction of the Federal Courts, by bringing within such jurisdiction things nonmaritime, to-wit: mortgages on ships. This court overruled those exceptions and held the Ship Mortgage Act providing for foreclosure of preferred mortgages on ships to be constitutional. Detroit Trust Company v. Barlum, 56 Fed. (2nd) 455. Thereafter the claimant answered in the actions setting up two separate defenses. First, that the proceeds of the loans, as security for which these mortgages were given, were used almost entirely for nonmaritime purposes, such as real estate loans, to the knowledge of libelant when the mortgages were given. Second, that the foreclosure provision of the Ship [fol. 265] Mortgage Act is unconstitutional. Thereupon the libelant in turn excepted to the two defenses set up in the answer. This court, after a hearing, sustained libelant's exceptions to the second defense, in accordance with its opinion above cited holding the Ship Mortgage Act consti-

tutional. Libelant's exceptions to the first defense were overruled and the cases went to trial on the question whether the fact allegations in the first defense, to-wit: that the proceeds of the loans as security for which these mortgages were given were used almost entirely for nonmaritime purposes, raised a triable issue as to the actual character of these particular mortgages.

On the trial it was shown that a considerable part of the proceeds of each of the two hundred thousand dollar mortgages was applied by the mortgagor, or by agreement between the mortgagor and the mortgagee, to nonmaritime purposes.

Proctors for the claimant in their brief argue ably against the constitutionality of the foreclosure provisions of the Ship Mortgage Act. I have determined that question in favor of its constitutionality (Detroit Trust Company v. Barlum, supra) and will not further discuss it here. The question now is whether in the case of a mortgage, the proceeds of which were in large part or were intended to be in large part devoted to a nonmaritime purpose, such mortgage was a contract that could be taken cognizance of by the Admiralty Court in proceedings for foreclosure under the provisions of the Ship Mortgage Act.

[fol. 266] The Ship Mortgage Act of 1920 provides for preferred mortgages on shipping and for their enforcement. In the cases cited in which the constitutionality of the act was upheld, The Oconee, 280 Fed. 927, The Nanking, 292 Fed., 642, The Lincoln Land, 295 Fed. 358, in two of them the mortgages were purchase money mortgages and in the other the proceeds of the mortgage were used for reconditioning the ship. It does not appear in any of the cases that the purpose for which the money was obtained or the use to which it was put influenced the decision. The Ship Mortgage Act providing for the preferred status of mortgages on vessels says nothing about the use to which the proceeds of the loan was to be put. The broad purpose of the act which was to permit of adequate financing of shipping did not and could not limit the application of the proceeds of a loan to a particular use. It might well be that money obtained from a preferred ship mortgage would be used by the individual or company obtaining it in fitting out its fleet by expending it for a number of purposes other than maritime. I think it would nullify the

Ship Mortgage Act, which I found to be constitutional, to hold that because some part of the money obtained on a ship mortgage was used for a purpose not distinctly maritime that the entire mortgage did not come within the provisions of the act.

There is no question raised here of the validity of these mortgages. The only question is the right of the libelant to enforce these mortgages in a Court of Admiralty. Each of [fol. 267] these mortgages, properly executed and validated by compliance with the provisions of the statute, became a lien upon the mortgaged vessel. The action to foreclose the lien may be brought by the provisions of Chapter 25, Section 951, by suit in rem in admiralty. Assuming the constitutionality of this act, we have the Admiralty Court exercising jurisdiction over the ship itself which duly launched and in the waters of the United States is certainly a maritime thing.

My conclusion is that the libels in both cases are sustained.

A decree may be submitted upon notice.

Dated March 9th, 1933.

Simon L. Adler, U. S. D. J.

[fol. 268] In United States District Court

Decree of Foreclosure of Preferred Mortgage and Order of Sale, Suit No. 1794.—Entered April 13, 1933

This cause having regularly come on to be heard upon the libel of Detroit Trust Company (formerly Detroit and Security Trust Company), Trustee, for foreclosure of a preferred mortgage against the Steamer Thomas Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances, and for other relief under the "Ship Mortgage Act, 1920" (Act of June 5, 1920), and upon the answer of Barlum Steamship Company, Claimant, and the defaults of all persons not appearing herein having been duly taken and entered in accordance with the rules and practices of this Court; and the Court having heard the proofs and the evidence adduced by the respective parties; and the cause having been duly argued by their respective advocates, and due deliberation having been had, and the

Court having filed its opinion sustaining the right of the libelant to enforce such preferred mortgage in a Court of Admiralty, and sustaining the libel herein, and directing the submission of a decree herein upon notice, and due notice of the submission hereof to said Court having been given:

The Court finds that the allegations of the Libel of Detroit Trust Company, Trustee, are true; that the said Steamer Thomas Barlum is a vessel of the United States of the burden of, to-wit: 5752 gross and 4485 net tons register, duly enrolled for the coasting trade of the United States [fol. 269] and the Great Lakes and their connecting and tributary waters; that on or about March 1, 1929, the Barlum Steamship Company, sole owner of said Steamer Thomas Barlum, her engines, boilers, etc., being justly indebted to libelant, Detroit Trust Company, Trustee, in the principal sum of $200,000, executed as mortgagor and delivered to said libelant, Detroit Trust Company, Trustee, as mortgagee, a preferred mortgage under the "Ship Mortgage Act, 1920" (being the Act of Congress of June 5, 1920), covering the whole of said Steamer Thomas Barlum, her engines, boilers, etc., which said preferred mortgage secured said indebtedness, and which said indebtedness was evidenced by a series of two hundred first preferred mortgage gold bonds of the denomination of $1000 each, in the aggregate principal amount of $200,000; that said bonds were dated March 1, 1929, and were payable as follows:

$25,000.00—Bonds Nos.	1- 25,	inclusive,	Februray 1, 1931
25,000.00—Bonds Nos.	26- 50,	inclusive,	February 1, 1932
25,000.00—Bonds Nos.	51- 75,	inclusive,	February 1, 1933
25,000.00—Bonds Nos.	76-100,	inclusive,	February 1, 1934
100,000.00—Bonds Nos.	101-200,	inclusive,	February 1, 1935

each bearing interest at 6% per annum, payable semi-annually, on the 1st days of August and February in each year.

And the Court further finds that said preferred mortgage, dated March 1, 1929, was duly filed for record in the office of the Collector of Customs at the port of Detroit, Michigan, the port of documentation of said vessel, and that said mortgage was duly recorded in the office of said Col- [fol. 270] lector in Book "V" of Mortgages, page 66, at 12:49 o'clock p. m., on the 25th day of March, 1929; that said

record shows the name of the vessel, the names of the parties to said mortgage, the time and date of reception of said mortgage, the interest in the vessel mortgaged, and the amount and date of maturity of said mortgage, all in accordance with Section 30 of the Merchant Marine Act of Congress of the United States of June 5, 1920, known as the "Ship Mortgage Act, 1920";

And the Court further finds that said preferred mortgage was duly endorsed upon the Marine Document of said vessel by the Collector of Customs at the port of Detroit, Michigan, the port of documentation of said Steamer Thomas Barlum, in accordance with the provisions of Section 30, Subsections (c) and (e) of the said "Ship Mortgage Act, 1920"; that an affidavit was filed with the record of said mortgage to the effect that the mortgage was made in good faith and without any design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel; that libelant, Detroit Trust Company (formerly Detroit and Security Trust Company), Trustee, mortgagee under said mortgage, by its Vice-President, made affidavit which was filed with the record of said mortgage to the effect that said libelant, the mortgagee, was then a citizen of the United States within the meaning of Section 2 of the Shipping Act of 1916, as amended by the Merchant Marine Act of June 5, 1920; that said libelant, the [fol. 271] mortgagee, still is a citizen of the United States within the meaning of said Acts; that said mortgage does not stipulate that the mortgagee waives the preferred status thereof; that the Collector of Customs at the port of Detroit, Michigan, upon the recording of said preferred mortgage, delivered two certified copies thereof to the mortgagor, Barlum Steamship Company, and that the mortgage was duly acknowledged according to law;

And the court further finds that said mortgage was duly endorsed by the Collector of Customs at the port of Detroit, Michigan, the port of documentation of said vessel, upon the Marine Document of said vessel, on the 28th day of March, 1929, at 3:00 o'clock p. m., and that there was then and there endorsed upon the said Marine Document of said vessel the names of the mortgagor and mortgagee, the time and date the endorsement was made, and the amount and date of maturity of said mortgage;

And the Court further finds that all of the acts and things required to be done by the "Ship Mortgage Act, 1920" in order to give said mortgage the status of a preferred mortgage were duly done or caused to be done, either by libelant, Detroit Trust Company, Trustee, the mortgagee, or by the Collector of Customs at the port of Detroit, Michigan, and that said mortgage, dated the 1st day of March, 1929, executed and delivered by Barlum Steamship Company, claimant herein, as mortgagor, to said libelant, Detroit Trust Company, Trustee, as mortgagee, is a preferred mortgage under the said "Ship Mortgage Act, 1920"; and [fol. 272] that it is hereby declared to be a valid and subsisting maritime lien upon the said Steamer Thomas Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances in said preferred mortgage described and thereby conveyed and transferred, prior and superior to the interests, liens or claims of any and all persons, firms or corporations whatsoever;

And the Court further finds that no person, firm or corporation has recorded a notice of claim of an undischarged lien upon the said vessel as provided in Section 30 of the "Ship Mortgage Act, 1920," and that there are no undischarged encumbrances, liens or mortgages of record against the said vessel other than the said preferred mortgage;

And the Court further finds that bonds numbered 1 to 25, inclusive, for $1000 each, dated March 1, 1929, and due February 1, 1931, and aggregating $25,000 in principal amount, have not been paid, although the said Barlum Steamship Company has often been requested to pay the same, and that default as to said payment has continued up to the date of filing the libel of Detroit Trust Company, Trustee herein, and still continues; that said preferred mortgage provided in part as follows:

"If default shall be made in the payment of any of the bonds or coupons aforesaid, principal or interest, or any part thereof * * *, and if such default shall continue for fifteen (15) days * * *, the Trustee may declare all of the said bonds and coupons then outstanding immedi- [fol. 273] ately due and payable, anything herein to the contrary notwithstanding * * * and may take such vessel without legal process wherever the same may be, and hold, charter, operate or otherwise use the same for such

time and on such terms as it may deem to the best advantage of its trust, or at its option in each and every such event or events of default, the Trustee may either with or without taking actual possession of said vessel, sell the same free from any claim, title or estate of the mortgagor * * *."

And the Court further finds that, pursuant to the above provision of said preferred mortgage, libelant, Detroit Trust Company, Trustee, as mortgagee under said preferred mortgage, duly declared all of the said principal sum secured thereby and the said outstanding bonds numbered 1 to 200, inclusive, hereinabove referred to and aggregating $200,000 in principal amount, together with interest thereon, to be immediately due and payable, and that a notice declaring said bonds immediately due and payable in accordance with said provisions was personally served on John J. Barlum, President of the Barlum Steamship Company, mortgagor, but that said mortgagor, in default of its obligation under said preferred mortgage, has wholly failed to pay the principal and/or interest of said outstanding bonds so declared immediately due and payable, or any part thereof, and that the interest on said principal sum at the date of this decree is the sum of $26,164.35.

[fol. 274] And the Court further finds that said Barlum Steamship Company has failed to pay insurance premiums for marine insurance covering said vessel, amounting to $1666.00, and that said insurance premiums have been advanced and paid by said libelant, Detroit Trust Company, Trustee, as mortgagee under said preferred mortgage, the interest on which advance at the date of this decree is $98.30; and the Court further finds, per the stipulation of the parties, that since the 28th day of June, 1932, the libelant, Detroit Trust Company, Trustee, has further advanced and paid for insurance premiums for marine insurance covering said vessel the additional sum of $1278.00, and that there is now further due and owing for additional premiums of insurance thereon to April 1, 1933, the additional sum of $426.00, amounting in all to the sum of $1704.00, which sum is stipulated may be included herein in addition to said sum of $1666.00 as shown by the proofs; and the Court further finds that said Barlum Steamship Company has failed to pay the annual trustee's fee in the

sum of $200.00 for the year 1932 as required under said preferred mortgage, the interest on which sum from the date due until the date of this decree is $14.00;

And the Court further finds that by reason of the premises, the balance due and owing on said bonds secured by said preferred mortgage, and said insurance premiums and trustee's fee with interest thereon to the date of this decree is $229,846.65, which said amount is a valid and subsisting maritime lien on the said Steamer Thomas Barlum, her [fol. 275] engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances.

It is accordingly Ordered and Decreed:

1. That libelant, Detroit Trust Company, Trustee, the mortgagee under said preferred mortgage, do have and recover against the Steamer Thomas Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances, the said sum of $229,846.65, with interest at 6% from the date hereof until paid, together with the costs of said libelant to be hereinafter taxed.

2. And it is further Ordered and Decreed that the Steamer Thomas Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances be, and and the same is hereby condemned and ordered sold to satisfy the claim and lien of libelant, Detroit Trust Company (formerly Detroit and Security Trust Company), Trustee, mortgagee under said preferred mortgage, amounting on the date of the entry of this decree to the sum of $229,846.65 with interest at 6% per annum until paid, which said claim has been asserted, proved and allowed against said vessel as far as the proceeds derived from the sale thereof may suffice, and that the Clerk of this Court issue a writ of venditioni exponas to the United States Marshal for this District for the sale of said vessel accordingly.

3. And it is further Ordered and Decreed that the Clerk of this Court, upon application of the libelant and without [fol. 276] further order of this Court, issue such writ of venditioni exponas to the United States Marshal for this District for the sale of said vessel in accordance herewith.

4. And it is further Ordered and Decreed that said Steamer Thomas Barlum be sold by the United States Mar-

shal at public sale to the highest and best bidder in the corridor on the first floor of the Federal Building at Buffalo, New York, that the terms of said sale be for cash, except as hereinafter allowed and provided; that the notice of such sale be published on six successive days in the Buffalo Courier-Express, and that further notice of said sale in the form of an advertisement be published in the Cleveland Plain Dealer, The Superior Evening Telegram, The Detroit Free Press and The Chicago Tribune, the first of such publications to be not less than ten days prior to the date of such sale; that said notice and advertisement shall be inserted on two different days prior to the date of sale in each of said papers; that said Marshal shall incorporate in said notice a provision that the successful bidder must be prepared to pay down ten per cent (10%) of his bid in cash and shall be required to pay the balance upon tender of a marshal's bill of sale, or within twenty-four hours of such tender, and that upon the failure of such purchaser to pay the balance of such purchase price, the said deposit of ten per cent (10%) shall become forfeited and apply to the payment of costs, the balance, if any, to be turned into the registry of this court to be hereinafter [fol. 277] dealt with; that said United States Marshal shall make prompt report of his proceedings under this order.

5. And it is further Ordered and Decreed that said sale shall be subject to the confirmation of this Court and shall be so designated in the notice of sale, and that the Marshal on confirmation of such sale shall deliver to the purchaser or purchasers a deed or marshal's bill of sale of the said Steamer Thomas Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances; and put the said purchaser or purchasers in immediate possession thereof, and forthwith render the proceeds of such sale unto the registry of this Court.

6. And it is further Ordered and Decreed that for the purpose of this sale the successful bidder may satisfy and make good his said bid by paying to the Marshal in cash an amount to satisfy the costs of this court, including Clerk's and Marshal's fees and expenses and may satisfy the balance of his said bid by payment thereof with bonds and/or coupons secured by said preferred mortgage to the extent that such bonds and/or coupons would be entitled

to participate in the net proceeds of such sale if the entire bid had been paid in cash.

That following the sale of said vessel as herein provided, a consolidated monition shall be issued by the Clerk of this Court, returnable on a court day at least fourteen days thereafter, which said monition shall be published in accordance with the rules and practice of this Court, and that [fol. 278] upon said return day of said consolidated monition, provided that no petitions for intervention on behalf of lienors possessing or being entitled to preferred maritime liens as described in the statutes of the United States relating to preferred marine mortgages known as the "Ship Mortgage Act," shall have been theretofore filed in the court, this Court shall thereupon proceed to confirmation of such sale. In the event that such petitions of intervention shall have been so filed herein, this Court shall require said interveners to establish their respective claims to preferred maritime liens forthwith, and that if any such claims be established to the satisfaction of the Court, the Court shall thereupon require the successful bidder as a condition precedent to the granting and entry of any order of confirmation of sale, if Bonds have been deposited by the terms of this decree, to deposit in the registry of the Court in addition to the moneys hereinbefore provided, a sum sufficient in lieu of Bonds, to discharge the amount of said intervening claim or claims so established, as preferred maritime liens under the statutes of the United States.

7. And it is further Ordered and Decreed that the time within which payment of said sum of $229,846.65 herein found due and payable to libelant, Detroit Trust Company, Trustee, mortgagee under said preferred mortgage with interest and costs of this suit, may be made and said vessel, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances, redeemed from this decree [fol. 279] of foreclosure is limited to the date of confirmation of said sale, and that in default of the payment to said libelant, Detroit Trust Company, Trustee, mortgagee under said preferred mortgage, of the said sum of $229,846.65, together with interest from the date hereof, and a sum sufficient to pay the costs of this suit prior to the confirmation of said sale by this Court, that any and all persons, firms and corporations claiming any interest

in the said Steamer Thomas Barlum shall, on confirmation of said sale, be forever barred and foreclosed of and from all right or equity of redemption or claim of, in or to said mortgaged Steamer Thomas Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances, and every part thereof.

8. And it is further Ordered and Decreed that the Clerk of this Court, out of the proceeds of said sale, shall first pay all of the costs of this Court, including Clerk's and Marshal's costs, and after payment of such costs shall pay to libelant its claim, retaining the balance remaining, if any, in the registry of this Court, subject to the further order of this Court.

Dated April 5th, 1933.

Simon L. Adler, United States District Judge.

O. K. as to form and amount.

George E. Brand, Burke & Desmond.

[fol. 280] IN UNITED STATES DISTRICT COURT

DECREE OF FORECLOSURE OF PREFERRED MORTGAGE AND ORDER OF SALE, IN SUIT NO. 1795—Entered April 13, 1933

This cause having regularly come on to be heard upon the Libel of Detroit Trust Company, Trustee, for the foreclosure of a preferred mortgage against the Steamer John J. Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances and for other relief under the "Ship Mortgage Act, 1920" (Act of June 5, 1920), and upon the answer of Barlum Steamship Company, Claimant, and also upon the intervening libel of William W. Parry, William C. Houston, Andrew R. Brabaw and J. H. Young in a cause of contract, civil and maritime, for seamen's wages; and the defaults of all persons not appearing herein having been duly taken and entered in accordance with the rules and practices of this Court; and the Court having heard the proofs and the evidence adduced by the respective parties; and the cause having been duly argued by their respective advocates, and due deliberation having been had, and the Court having filed its opin-

ion sustaining the right of the libelant to enforce such preferred mortgage in a Court of Admiralty, and sustaining the libel herein, and directing the submission of a decree herein upon notice, and due notice of the submission hereof to said Court having been given:

The Court finds that there is due intervening libelant, William W. Parry for seaman's wages and interest thereon from December 31, 1930, to April 1, 1933, the sum of [fol. 281] $604.20; to intervening libelant William C. Houston for seaman's wages and interest thereon from December 31, 1930, to April 1, 1933, the sum of $1,350.98; to intervening libelant Andrew R. Brabaw for seaman's wages and interest thereon from December 31, 1930, to April 1, 1933, the sum of $462.80; and to intervening libelant J. H. Young, for seaman's wages and interest thereon from December 31, 1930 to April 1, 1933, the sum of $473.93, all of which constitute preferred maritime liens against the said vessel, superior to the maritime liens of all other parties.

And the Court further finds that the allegations of the Libel of Detroit Trust Company, Trustee, are true; that the said Steamer John J. Barlum is a vessel of the United States of the burden of, to-wit, 6158 gross and 4924 net tons register, duly enrolled for the coasting trade of the United States and the Great Lakes and their connecting and tributary waters; that on or about December 15, 1927, the Barlum Steamship Company, sole owner of said Steamer John J. Barlum, her engines, boilers, etc., being justly indebted to libelant Detroit Trust Company Trustee, in the principal sum of $200,000, executed as mortgagor and delivered to said libelant Detroit Trust Company, Trustee, as mortgagee, a preferred mortgage under the "Ship Mortgage Act, 1920" (being the Act of Congress of June 5, 1920) covering the whole of said Steamer John J. Barlum, her engines, boilers, etc., which said preferred mortgage secured said indebtedness, and which said indebtedness was evi- [fol. 282] denced by a series of two hundred first preferred mortgage gold bonds of the denomination of $1,000 each, in the aggregate principal amount of $200,000; that said bonds were dated December 15, 1927, and were payable as follows:

$50,000.00—	Bonds Nos.	1- 50,	inclusive, December 15, 1930
50,000.00—	Bonds Nos.	51-100,	inclusive, December 15, 1931
50,000.00—	Bonds Nos.	101-150,	inclusive, December 15, 1932
50,000.00—	Bonds Nos.	151-200,	inclusive, December 15, 1933

each bearing interest at 6% per annum, payable semi-annually on the 15th days of June and December in each year;

And the Court further finds that said preferred mortgage, dated December 15, 1927, was duly filed for record in the office of the Collector of Customs at the port of Detroit, Michigan, the port of documentation of said vessel, and that said mortgage was duly recorded in the office of said Collector in Book "V" of Mortgages, page 53, at 11:30 o'clock a. m., on the 6th day of January, 1928; that said record shows the name of the vessel, the names of the parties to said mortgage, the time and date of reception of said mortgage, the interest in the vessel mortgaged, and the amount and date of maturity of said mortgage, all in accordance with Section 30 of the Merchant Marine Act of Congress of the United States of June 5, 1920, known as the "Ship Mortgage Act, 1920";

And the Court further finds that said preferred mortgage was duly endorsed upon the Marine Document of said vessel by the Collector of Customs at the port of Detroit, Michigan, the port of documentation of said Steamer John J. [fol. 283] Barlum, in accordance with the provisions of Section 30, Subsections (c) and (e) of the said "Ship Mortgage Act, 1920"; that an affidavit was filed with the record of said mortgage to the effect that the mortgage was made in good faith and without any design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel; that libelant, Detroit Trust Company, Trustee, mortgagee under said mortgage, by its Vice-President, made affidavit which was filed with the record of said mortgage to the effect that said libelant, the mortgagee, was then a citizen of the United States within the meaning of Section 2 of the Shipping Act of 1916, as amended by the Merchant Marine Act of June 5, 1920; that said libelant, the mortgagee, still is a citizen of the United States within the meaning of said Acts; that said mortgage does not stipulate that the mortgagee waives the preferred status thereof; that the Collector of Customs at the port of Detroit, Michigan, upon the recording of said preferred mortgage, delivered two certified copies thereof to the mortgagor, Barlum Steamship Company, and that the mortgage was duly acknowledged according to law;

And the Court further finds that said mortgage was duly endorsed by the Collector of Customs at the port of Detroit, Michigan, the port of documentation of said vessel, upon the Marine Document of said vessel, on the 6th day of January, 1928, at 4:20 o'clock p. m., and that there was then and there endorsed upon the said Marine Document of said [fol. 284] vessel, the names of the mortgagor and mortgagee, the time and date the endorsement was made, and the amount and date of maturity of said mortgage;

And the Court further finds that all of the acts and things required to be done by the "Ship Mortgage Act, 1920" in order to give said mortgage the status of a preferred mortgage were duly done or caused to be done, either by libelant, Detroit Trust Company, Trustee, the mortgagee, or by the Collector of Customs at the port of Detroit, Michigan, and that said mortgage dated the 15th day of December, 1927, executed and delivered by Barlum Steamship Company, claimant herein, as mortgagor, to said libelant Detroit Trust Company, Trustee, as mortgagee, is a preferred mortgage under the said "Ship Mortgage Act, 1920"; and that it is hereby declared to be a valid and subsisting maritime lien upon the said Steamer John J. Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances in said preferred mortgage described and thereby conveyed and transferred, prior and superior to the interests, liens or claims of any and all persons, firms or corporations whatsoever, except the liens for seamen's wages of William W. Parry, William C. Houston, Andrew R. Brabaw and J. H. Young, intervening libelants herein, amounting with interest to April 1, 1933, to the respective sums of $604.20, $1,350.98, $462.80 and $473.93 and aggregating $2,891.91 in amount;

And the Court further finds that no person, firm or corpo- [fol. 285] ration has recorded a notice of claim of an undischarged lien upon the said vessel as provided in Section 30 of the "Ship Mortgage Act, 1920" and that there are no undischarged encumbrances, liens or mortgages of record against the said vessel other than the said preferred mortgage;

And the Court further finds that bonds numbered 1 to 50, inclusive, for $1000 each, dated December 15, 1927, and due December 15, 1930, and aggregating $50,000 in princi-

pal amount, have not been paid, although the said Barlum Steamship Company has often been requested to pay the same, and that default as to said payment has continued up to the date of filing the libel of Detroit Trust Company, Trustee herein, and still continues; that said preferred mortgage provided in part as follows:

"If default shall be made in the payment of any of the bonds or coupons aforesaid, principal or interest, or any part thereof * * * and if such default shall continue for fifteen (15) days * * * the Trustee may declare all of the said bonds and coupons then outstanding immediately due and payable, anything herein to the contrary notwithstanding * * * and may take such vessel without legal process wherever the same may be, and hold, charter, operate or otherwise use the same for such time and on such terms as it may deem to the best advantage of its trust, or at its option in each and every such event or events of default, the Trustee may either with or without taking actual possession of said vessel, sell the [fol. 286] same free from any claim, title or estate of the mortgagor * * *."

And the Court further finds that, pursuant to the above provision of said preferred mortgage, libelant, Detroit Trust Company, Trustee, as mortgagee under said preferred mortgage, duly declared all of the said principal sum secured thereby and the said outstanding bonds numbers 1 to 200, inclusive, hereinabove referred to and aggregating $200,000 in principal amount, together with interest thereon, to be immediately due and payable, and that a notice declaring said bonds immeditely due and payable in accordance with said provisions was personally served on John J. Barlum, President of the Barlum Steamship Company, mortgagor, but that said mortgagor, in default of its obligation under said preferred mortgage, has wholly failed to pay the principal and/or interest of said outstanding bonds so declared immediately due and payable, or any part thereof, and that the interest on said principal sum at the date of this decree is the sum of $27,664.35.

And the Court further finds that said Barlum Steamship Company has failed to pay insurance premiums for marine insurance covering said vessel, amounting to $5391.94; and that said insurance premiums have been ad-

vanced and paid by said libelant, Detroit Trust Company, Trustee, as mortgagee under said preferred mortgage, the interest on which advance at the date of this decree is $427.87; and the Court further finds, per the stipulation of the parties, that since the 28th day of June, 1932, the [fol. 287] libelant, Detroit Trust Company, Trustee, has further advanced and paid for insurance premiums for marine insurance covering said vessel the additional sum of $1278.00, and that there is now further due and owing for additional premiums of insurance thereon to April 1, 1933, the additional sum of $426.00, amounting in all to the sum of $1704.00, which sum is stipulated may be included herein in addition to said sum of $5391.94, as shown by the proofs; and the Court further finds that said Barlum Steamship Company has failed to pay the annual Trustee's fee in the sum of $200.00 for the year 1931, as required under said preferred mortgage; the interest on which fee from the date due to the date of this decree is $27.50.

And the Court further finds that by reason of the premises, the balance due and owing on said bonds secured by said preferred mortgage, and said insurance premiums and trustee's fee with interest thereon to the date of this decree is $235,415.66 which said amount is a valid and subsisting maritime lien on the said Steamer John J. Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances, subject only to the preferred liens of intervening libelants for seamen's wages in the following amounts, to-wit:

William W. Parry	$604.20
William C. Houston	1350.98
Andrew R. Brabaw	462.80
J. H. Young	473.93

It is accordingly Ordered and Decreed:

1. That intervening libelants William W. Parry, Wil- [fol. 288] liam C. Houston, Andrew R. Brabaw and J. H. Young, do have and recover against the Steamer John J. Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances, the respective sums of $604.20, $1350.98, $462.80 and $473.93 with interest at 5% from the date hereof until paid, together with the costs of said intervening libelants to be hereinafter taxed.

2. And it is further Ordered and Decreed that libelant, Detroit Trust Company, Trustee, the mortgagee under said preferred mortgage, do have and recover against the Steamer John J. Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances, the said sum of $235,415.66 with interest at 6% from the date hereof until paid, together with the costs of said libelant to be hereinafter taxed.

3. And it is further Ordered and Decreed that the Steamer John J. Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances be, and the same is hereby condemned and ordered sold to satisfy the claims and liens of intervening libelants, William W. Parry, William C. Houston, Andrew R. Brabaw and J. H. Young, amounting on the date of the entry of this decree to the respective sums of $604.20, $1350.98, $462.80 and $473.93, with interest at 5% per annum until paid, which said four claims and liens for seamen's wages are of equal rank one with the other; and the claim and lien of libelant, Detroit Trust Company, Trustee, mortgagee under said preferred mortgage, amounting on the [fol. 289] date of the entry of this decree to the sum of $235,415.66 with interest at 6% per annum until paid, which said claims have been asserted, proved and allowed against said vessel in the order of priority herein set forth as far as the proceeds derived from the sale thereof may suffice and in said order of priority of said liens, and that the Clerk of this Court issue a writ of venditioni exponas to the United States Marshal for this District for the sale of said vessel accordingly.

4. And it is further Ordered and Decreed that the Clerk of this Court, upon application of libelant and without further order of this Court, issue such writ of venditioni exponas to the United States Marshal for this District for the sale of said vessel in accordance herewith.

5. And it is further Ordered and Decreed that said Steamer John J. Barlum be sold by the United States Marshal at public sale to the highest and best bidder in the corridor on the first floor of the Federal Building at Buffalo, New York, that the terms of said sale be for cash, except as hereinafter allowed and provided; that the notice of such sale be published on six successive days in the Buffalo

Courier-Express, and that further notice of said sale in the form of an advertisement be published in the Cleveland Plain Dealer, The Superior Evening Telegram, The Detroit Free Press, and The Chicago Tribune, the first of such publications to be not less than ten days prior to the date of such sale; that said notice and advertisement shall [fol. 290] be inserted on two different days prior to the date of sale in each of said papers; that said Marshal shall incorporate in said notice a provision that the successful bidder must be prepared to pay down ten per cent (10%) of his bid in cash and shall be required to pay the balance upon tender of a marshal's bill of sale, or within twenty-four hours of such tender, and that upon the failure of such purchaser to pay the balance of such purchase price, the said deposit of ten per cent (10%) shall become forfeited and apply to the payment of costs, the balance, if any, to be turned into the registry of this court to be hereinafter dealt with; that said United States Marshal shall make prompt report of his proceedings under this order.

6. And it is further Ordered and Decreed that said sale shall be subject to the confirmation of this Court and shall be so designated in the notice of sale, and that the Marshal on confirmation of such sale shall deliver to the purchaser or purchasers a deed or marshal's bill of sale of the said Steamer John J. Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances, and put the said purchaser or purchasers in immediate possession thereof, and forthwith render the proceeds of such sale unto the registry of this Court.

7. And it is further Ordered and Decreed that for the purpose of this sale the successful bidder may satisfy and make good his said bid by paying to the Marshal in cash an amount to satisfy the costs of this court, including Clerk's [fol. 291] and Marshal's fees and expenses and the liens of intervening libelants, William W. Parry, William C. Houston, Andrew R. Brabaw and J. H. Young, herein found by the Court to be superior in rank to the lien of said preferred mortgage, and may satisfy the balance of his said bid by payment thereof with bonds and/or coupons secured by said preferred mortgage to the extent that such bonds and/or coupons would be entitled to participate in the net proceeds of such sale if the entire bid had been paid in cash.

That following the sale of said vessel as herein provided, a consolidated monition shall be issued by the Clerk of this Court, returnable on a court day at least fourteen days thereafter, which said monition shall be published in accordance with the rules and practice of this Court, and that upon said return day of said consolidated monition, provided that no petitioners for intervention on behalf of lienors possessing or being entitled to preferred maritime liens as described in the statutes of the United States relating to preferred marine mortgages known as the "Ship Mortgage Act," shall have been theretofore filed in the Court, this Court shall thereupon proceed to confirmation of such sale. In the event that such petitions of intervention shall have been so filed herein, this court shall require said interveners to establish their respective claims to preferred maritime liens forthwith, and that if any such claims be established to the satisfaction of the Court, the Court shall thereupon require the successful bidder as a condition precedent to the granting and entry of any order of con-
[fol. 292] firmation of sale, if Bonds have been deposited by the terms of this decree, to deposit in the registry of the Court in addition to the moneys hereinbefore provided, a sum sufficient in lieu of Bonds, to discharge the amount of said intervening claim or claims so established, as preferred maritime liens under the statutes of the United States.

8. And it is further Ordered and Decreed that the time within which payment of the said sum of $235,415.66 herein found due and payable to libelant, Detroit Trust Company, Trustee, mortgagee under said preferred mortgage, with interest and costs of this suit, may be made and said vessel, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances, redeemed from this decree of foreclosure is limited to the date of confirmation of said sale, and that in default of the payment to said libelant, Detroit Trust Company, Trustee, mortgagee under said preferred mortgage, of the said sum of $235,415.66, together with interest from the date hereof, and a sum sufficient to pay the costs of this suit prior to the confirmation of said sale by this Court, that any and all persons, firms and corporations claiming any interest in the said Steamer John J. Barlum shall, on confirmation of said sale, be forever barred and foreclosed of and from all right or equity of redemption or claim of, in or to said mortgaged Steamer John

J. Barlum, her engines, boilers, boats, machinery, tackle, apparel, furniture and other appurtenances, and every part thereof.

[fol. 293] 9. And it is further Ordered and Decreed that the Clerk of this Court, out of the proceeds of said sale, shall first pay all of the costs of this Court, including Clerk's and Marshal's costs, and after payment of such costs shall pay to libelant and intervening libelants their respective claims and in the order of priority allowed herein, retaining the balance remaining, if any, in the registry of this Court, subject to the further order of this Court.

Dated April 5th, 1933.

Simon L. Adler, United States District Judge.

O. K. as to form and amount.

George E. Brand, Burke & Desmond.

[fol. 294] In United States District Court

[Title omitted]

Findings and Conclusions, Suit No. 1794

In addition to the facts set forth in the decree herein, I, Simon L. Adler, District Judge, hereby find in the above entitled cause that:

1. Claimant Barlum Steamship Company is a West Virginia corporation with principal office at Detroit, Michigan.

2. The first mortgage to be executed by the steamship company on either of the steamers was a $100,000 trust mortgage dated December 1, 1924, on the Thomas Barlum, executed to Detroit Trust Company, as Trustee, to secure an issue of serial bonds of the steamship company guaranteed by John J. Barlum. The mortgage secured a loan [fol. 295] made by the Detroit Trust Company to the steamship company. The application made by the steamship company to the Michigan Securities Commission relating to the bond issue, prepared by the trust company, stated the purpose of the issue was "settlement of tax claims with U. S. Government based on question of depreciation and invested capital." The Government at the time was asserting a claim of about $100,000 against the steamship company for additional income and profits taxes. The company had already employed a tax expert to work on the mat-

ter and was able to get the claim reduced to $74 .). The Detroit Trust Company purchased the $100, of bonds at par and remitted the entire proceeds to t.. steamship company out of which the company paid the trust company its expenses in connection with the loan.

3. "Barlum Land Company" was a name used by John J. Barlum in connection with certain of his personal real estate holdings. "Barlum Realty Company" was a Michigan corporation which owned a forty-story office building in Detroit, Michigan, known as the Barlum Tower. In 1925 John J. Barlum and wife executed to Detroit Trust Company, Trustee, a bond issue trust mortgage for $1,250,000, covering so-called Barlum Land Company real estate consisting of buildings and leaseholds.

4. In January, 1927, the $100,000 mortgage on the Thomas Barlum had been reduced to $50,000. On January 28, 1927, the trust company, per L. K. Butler, Vice-president, wrote the President of the steamship company offer- [fol. 296] ing to purchase $75,000 of a new bond issue to be guaranteed by John J. Barlum individually, the papers to be drawn by the trust company's attorneys, $50,000 of the proceeds to be used to take up the remaining $50,000 on the first mortgage. The trust company accounted for the proceeds of the $75,000 mortgage and $450 accrued interest thereon, as follows:

Balance of bonds of first mortgage including 2% premium and accrued interest	$51,916.65
Trustee fees, expenses and attorney fees	320.20
Remittance to steamship company	23,213.15

5. By February, 1929, the $75,000 mortgage had been reduced to $50,000. Negotiations were had with the trust company (then known as Detroit and Security Trust Company) for an increased loan. On February 21, 1929, the trust company, per L. K. Butler, Vice-President, wrote the President of the steamship company a letter offering to purchase at 97% $200,000 of bonds secured by mortgage on the Thomas Barlum guaranteed by John J. Barlum (documents to be prepared by the trust company's attorneys) and stating:

"It is understood that as a condition of the above the proceeds of the purchase of said bonds by us are to be used as follows:

To pay the note issue now outstanding secured by mortgage on the same steamer	$50,000.00

[fol. 297]

Interest on the same from February 15th to which it is now paid up to March 1st, 1929	125.00
Annual fee due the Trustee	25.00
Closing fee due the Trustee	25.00
Attorneys' charges estimated	750.00
Trustee's fee for certifying new bonds	200.00
Cost of printing new bonds estimated	100.00
To take up principal debt of John J. Barlum and Thomas Barlum and Sons now held by us to the amount of	100,000.00
Balance to steamship company for repairs and refitting the Steamers 'Thomas Barlum' and 'John J. Barlum' for the season of 1929	42,775.00"

6. The proposed mortgage was prepared by the trust company's attorneys. Exhibit A attached to the libel in Admiralty Suit No. 1794 in this court, brought against the Thomas J. Barlum is a copy of the mortgage dated as of March 1, 1929, as executed and delivered on or about March 22, 1929.

7. The application to the Securities Commission relating to the $200,000 mortgage, supra, stated the purpose of the issue was to "refinance." As shown by the trust company's statement, the trust company withheld from the proceeds of the issue $50,358.33 to take up the balance of [fol. 298] the previous issue, $1545.23 for trustee and attorney fees, printing, recording, etc., and:

"Amount required to take up Thomas Barlum & Sons note, being principal and interest		$45,510.00
Amount necessary to take up John J. Barlum note, being principal and interest		33,566.50
Amount to apply on account of principal of John J. Barlum note	$20,745.50	
Accrued int. to Mch. 25th	178.00	
		20,923.50
Balance to Barlum Steamship Company		42,896.44"

8. At the time each of the three mortgages hereinbefore referred to were executed on the Thomas Barlum, the steamer was laid up.

9. On December 23, 1927, the trust company wrote the President of the steamship company offering to purchase an issue of $200,000 of bonds on the Steamer John J. Barlum at 98%, the bonds to be guaranteed by John J. Barlum, the documents to be satisfactory to the trust company's attorneys. The mortgage was executed with the understanding that $82,281.25 was to be withheld by the trust company to pay $50,000 of principal and $32,281.25 of interest on the bond issue mortgage executed by John J. Barlum and wife to the trust company as trustee covering the individual real estate and leaseholds of John J. Barlum previously re- [fol. 299] ferred to and that $10,000 was to be retained by the trust company and applied on an individual note executed by Mr. Barlum to the trust company dated August 11, 1927, evidencing a personal loan made to Mr. Barlum by the trust company. Such items, together with certain trustee and attorney fees and expenses, were withheld. The remainder of the proceeds amounting to $102,801.55 was paid to the steamship company.

10. The $200,000 mortgage on the John J. Barlum was prepared by the trust company's attorneys. Exhibit A attached to the libel in Admiralty Suit No. 1795 in this court, brought against the John J. Barlum, is a copy of the mortgage dated as of December 15, 1927, as executed and delivered on or about January 5, 1928.

11. The application of the proceeds of the mortgages mentioned in the 4th, 7th and 9th paragraphs above were made by the libelant with the approval and authorization of said steamship company.

Conclusions of Law

1. The provisions of the Ship Mortgage Act, 1920, vesting in the Admiralty Court jurisdiction by a proceeding in rem to foreclose the mortgage involved herein, are applicable to said mortgage and the foreclosure herein and confer jurisdiction upon the court in the proceedings herein to foreclose said mortgage as sought by libelant.

[fol. 300] 2. The provisions of said Ship Mortgage Act, 1920, referred to in the foregoing paragraph number 1 are valid and constitutional.

3. That libelant is entitled to a decree as prayed for in its libel.

Dated April 5th, 1933.

Simon L. Adler, District Judge.

[fol. 301] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS AND CONCLUSIONS, SUIT NO. 1795

In addition to the facts set forth in the decree herein, I, Simon L. Adler, District Judge, hereby find in the above entitled cause that:

1. Claimant Barlum Steamship Company is a West Virginia corporation with principal office at Detroit, Michigan.

2. The first mortgage to be executed by the steamship company on either of the steamers was a $100,000 trust mortgage dated December 1, 1924, on the Thomas Barlum, executed to Detroit Trust Company, as Trustee, to secure an issue of serial bonds of the steamship company guaranteed by John J. Barlum. The mortgage secured a loan made by the Detroit Trust Company to the steamship com-
[fol. 302] pany. The application made by the steamship company to the Michigan Securities Commission relating to the bond issue, prepared by the trust company, stated the purpose of the issue was "settlement of tax claims with U. S. Government based on question of depreciation and invested capital." The government at the time was asserting a claim of about $100,000 against the steamship company for additional income and profits taxes. The company had already employed a tax expert to work on the matter and was able to get the claim reduced to $74,402.29. The Detroit Trust Company purchased the $100,000 of bonds at par and remitted the entire proceeds to the steamship company out of which the company paid the trust company its expenses in connection with the loan.

3. "Barlum Land Company" was a name used by John J. Barlum in connection with certain of his personal real estate holdings. "Barlum Realty Company" was a Michigan corporation which owned a forty story office building in Detroit, Michigan, known as the Barlum Tower. In 1925 John J. Barlum and wife executed to Detroit Trust Company, Trustee, a bond issue trust mortgage for $1,250,000, covering so-called Barlum Land Company real estate consisting of buildings and leaseholds.

4. In January, 1927, the $100,000 mortgage on the Thomas Barlum had been reduced to $50,000. On January 28, 1927, the trust company per L. K. Butler, Vice-President, wrote the President of the steamship company offering to purchase $75,000 of a new bond issue to be guar- [fol. 303] anteed by John J. Barlum individually, the papers to be drawn by the trust company's attorneys, $50,000 of the proceeds to be used to take up the remaining $50,000 on the first mortgage. The trust company accounted for the proceeds of the $75,000 mortgage and $450 accrued interest thereon, as follows:

Balance of bonds of first mortgage including 2 per cent premium and accrued interest	$51,916.65
Trustee fees, expenses and attorney fees	320.20
Remittance to steamship company	23,213.15

5. By February, 1929, the $75,000 mortgage had been reduced to $50,000. Negotiations were had with the trust company (then known as Detroit and Security Trust Company) for an increased loan. On February 21, 1929, the trust company per L. K. Butler, Vice-President, wrote the President of the steamship company a letter offering to purchase at 97 per cent $200,000 of bonds secured by mortgage on the Thomas Barlum guaranteed by John J. Barlum (documents to be prepared by the trust company's attorneys) and stating:

"It is understood that as a condition of the above the proceeds of the purchase of said bonds by us are to be used as follows:

To pay the note issue now outstanding secured by mortgage on the same steamer	$50,000.00
Interest on the same from February 15th to which it is now paid up to March 1st, 1929	125.00

[fol. 304] Anual fee due the Trustee	25.00
Closing fee due the Trustee	25.00
Attorneys' charges estimated	750.00
Trustee's fee for certifying new bonds	200.00
Cost of printing new bonds estimated	100.00
To take up principal debt of John J. Barlum and Thomas Barlum and Sons now held by us to the amount of	100,000.00
Balance to steamship company for repairs and refitting the Steamers 'Thomas Barlum' and 'John J. Barlum' for the season of 1929	42,775.00''

6. The proposed mortgage was prepared by the trust company's attorneys. Exhibit A attached to the libel in Admiralty Suit No. 1794 in this court, brought against the Thomas J. Barlum is a copy of the mortgage dated as of March 1, 1929, as executed and delivered on or about March 22, 1929.

7. The application to the Securities Commission relating to the $200,000 mortgage, supra, stated the purpose of the issue was to "refinance." As shown by the trust company's statement, the trust company withheld from the proceeds of the issue $50,358.33 to take up the balance of the previous issue, $1,545.23 for trustee and attorney fees, printing, recording, etc., and:

"Amount required to take up Thomas Barlum & Sons note being principal and interest		$45,510.00
[fol. 305] Amount necessary to take up John J. Barlum note being principal and interest		33,566.50
Amount to apply on account of principal of John J. Barlum note	$20,745.50	
Accrued Int. to March 25th	178.00	
		20,923.50
Balance to Barlum Steamship Company		42,896.44''

8. At the time each of the three mortgages hereinbefore referred to were executed on the Thomas Barlum, the steamer was laid up.

9. On December 23, 1927, the trust company wrote the President of the steamship company offering to purchase an issue of $200,000 of bonds on the Steamer John J. Bar-

lum at 98 per cent, the bonds to be guaranteed by John J. Barlum, the documents to be satisfactory to the trust company's attorneys. The mortgage was executed with the understanding that $82,281.25 was to be withheld by the trust company to pay $50,000 of principal and $32,281.25 of interest on the bond issue mortgage executed by John J. Barlum and wife to the trust company as trustee covering the individual real estate and leaseholds of John J. Barlum previously referred to and that $10,000 was to be retained by the trust company and applied on an individual note executed by Mr. Barlum to the trust company dated August 11, 1927, evidencing a personal loan made to Mr. [fol. 306] Barlum by the trust company. Such items, together with certain trustee and attorney fees and expenses, were withheld. The remainder of the proceeds amounting to $102,801.55 was paid to the Steamship Company.

10. The $200,000 mortgage on the John J. Barlum was prepared by the trust company's attorneys. Exhibit A attached to the libel in Admiralty Suit No. 1795 in this court, brought against the John J. Barlum, is a copy of the mortgage dated as of December 15, 1927, as executed and delivered on or about January 5, 1928.

11. The application of the proceeds of the mortgages mentioned in the 4th, 7th and 9th, paragraphs above, were made by the libelant with the approval and authorization of said steamship company.

Conclusions of Law

1. The provisions of the Ship Mortgage Act, 1920, vesting in the admiralty court jurisdiction by a proceeding in rem to foreclose the mortgage involved herein, are applicable to said mortgage and the foreclosure herein and confer jurisdiction upon the court in the proceedings herein to foreclose said mortgage as sought by libelant.

2. The provisions of said Ship Mortgage Act, 1920, referred to in the foregoing paragraph number 1 are valid and constitutional.

[fol. 307] 3. That libelant is entitled to a decree as prayed for in its libel.

Dated April 5th, 1933.

Simon L. Adler, District Judge.

[fol. 308] IN UNITED STATES DISTRICT COURT

In Admiralty No. 1794

DETROIT TRUST COMPANY, a Michigan Corporation, Trustee, Libelant

v.

STEAMER THOMAS BARLUM, etc., Respondent,

BARLUM STEAMSHIP COMPANY, a West Virginia Corporation, Claimant

NOTICE OF AND ORDER ALLOWING APPEAL. ADMISSION OF SERVICE

SIRS: Please take notice that Barlum Steamship Company, Claimant, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree signed and entered herein on April 13, 1933.

Dated at Buffalo, New York, July 10, 1933.

Burke & Desmond, George E. Brand, Proctors for Claimant.

[fol. 309] To Stanley & Gidley and Miller, Canfield, Paddock & Stone, Proctors for Libelant:

The foregoing appeal is hereby allowed.

Dated at Buffalo, New York, July 10, 1933.

John Knight, U. S. District Judge.

Service of a copy of the within is admitted this 17th day of July, 1933.

Stanley & Gidley, Miller, Canfield, Paddock & Stone, Proctors for Libelant.

(Bond on appeal was filed and approved July 17, 1933.)

[fol. 310] IN UNITED STATES DISTRICT COURT

In Admiralty No. 1795

DETROIT TRUST COMPANY, a Michigan Corporation, Trustee, Libelant,

v.

STEAMER JOHN J. BARLUM, etc., Respondent,

BARLUM STEAMSHIP COMPANY, a West Virginia Corporation, Claimant

NOTICE OF AND ORDER ALLOWING APPEAL. ADMISSION OF SERVICE

SIRS: Please Take Notice that Barlum Steamship Company, Claimant, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree signed and entered herein on April 13, 1933.

Dated at Buffalo, New York, July 10, 1933.

Burke & Desmond, George E. Brand, Proctors for Claimant.

[fol. 311] To Stanley & Gidley and Miller, Canfield, Paddock & Stone, Proctors for Libelant:

The foregoing appeal is hereby allowed.

Dated at Buffalo, New York, July 10, 1933.

John Knight, U. S. District Judge.

Service of a copy of the within is admitted this 17th day of July, 1933.

Stanley & Gidley, Miller, Canfield, Paddock & Stone, Proctors for Libelant.

(Bond on appeal was filed and approved July 17, 1933.)

[fol. 312] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR, SUIT No. 1794

Appellant, Barlum Steamship Company, Claimant herein, hereby assigns error to the proceedings and decree

of the District Court in the above entitled cause, as follows:

1. The District Court erred in overruling Claimant's exception number 1 to the libel herein that the facts alleged in said libel do not constitute a cause of action within the admiralty and maritime jurisdiction of the court.

2. The District Court erred in overruling Claimant's exception number 2 to the libel herein that the facts alleged [fol. 313] in the libel do not give rise to any maritime lien upon the Steamer Thomas Barlum.

3. The District Court erred in sustaining Libelant's exceptions to the second defense set forth in Claimant's answer.

4. The District Court erred in holding that the provisions of The Ship Mortgage Act (46 USCA § 951) providing that upon default of any term or condition of a preferred mortgage, the lien thereof could be enforced in rem in admiralty and granting original jurisdiction therefor to the district courts of the United States, are applicable to the mortgage involved herein.

5. The District Court erred in holding that the provisions of The Ship Mortgage Act referred to in assignment of error No. 4 supra, are, as to Claimant, the steamer and mortgage involved herein, constitutional.

6. The District Court erred in holding that the provisions of the Ship Mortgage Act are applicable to the mortgage involved herein.

7. The District Court erred in holding that the provisions of The Ship Mortgage Act are, as to Claimant, the steamer and mortgage involved herein, constitutional.

8. The District Court erred in holding that the mortgage herein was such a contract that could be taken cognizance of by the admiralty court herein.

9. The District Court erred in not holding that the [fol. 314] mortgage involved herein was not a maritime contract and was not subject to foreclosure in the proceedings herein.

10. The District Court erred in not dismissing the libel herein.

11. The District Court erred in decreeing that the mortgage involved herein was a valid and subsisting maritime lien upon the steamer herein, her engines, etc.

12. The District Court erred in not holding that libelant was estopped to claim that the mortgage herein was a maritime contract and lien.

Burke & Desmond, George E. Brand, Proctors for Appellant (Claimant).

[fol. 315] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR, SUIT No. 1795

Appellant, Barlum Steamship Company, Claimant herein, hereby assigns error to the proceedings and decree of the District Court in the above entitled cause, as follows:

1. The District Court erred in overruling Claimant's exception number 1 to the libel herein that the facts alleged in said libel do not constitute a cause of action within the admiralty and maritime jurisdiction of the court.

2. The District Court erred in overruling Claimant's exception number 2 to the libel herein that the facts alleged in the libel do not give rise to any maritime lien upon the Steamer John J. Barlum.

3. The District Court erred in sustaining Libelant's exceptions to the second defense set forth in Claimant's answer.

4. The District Court erred in holding that the provisions of The Ship Mortgage Act (46 U. S. C. A. § 951) providing that upon default of any term or condition of a preferred mortgage, the lien thereof could be enforced in rem in admiralty and granting original jurisdiction therefor to the district courts of the United States, are applicable to the mortgage involved herein.

5. The District Court erred in holding that the provisions of The Ship Mortgage Act referred to in assignment of

error No. 4 supra, are, as to Claimant, the steamer and mortgage involved herein, constitutional.

6. The District Court erred in holding that the provi-
[fol. 316] sions of The Ship Mortgage Act are applicable to the mortgage involved herein.

7. The District Court erred in holding that the provisions of The Ship Mortgage Act are, as to Claimant, the steamer and mortgage involved herein, constitutional.

8. The District Court erred in holding that the mortgage herein was such a contract that could be taken cognizance of by the admiralty court herein.

9. The District Court erred in not holding that the mortgage involved herein was not a maritime contract and was not subject to foreclosure in the proceedings herein.

10. The District Court erred in not dismissing the libel herein.

11. The District Court erred in decreeing that the mortgage involved herein was a valid and subsisting maritime lien upon the steamer herein, her engines, etc.

12. The District Court erred in not holding that Libelant was estopped to claim that the mortgage herein was a maritime contract and lien.

13. The District Court erred in entertaining jurisdiction over the claims of intervening libelants Parry, Houston, Brabaw and Young, because the court had no jurisdiction under the libel.

Burke & Desmond, George E. Brand, Proctors for Appellant (Claimant).

[fol. 317] IN UNITED STATES DISTRICT COURT

STIPULATION EXTENDING TIME TO FILE RECORD

(Suit No, 1794)

It is Hereby Stipulated and Agreed by and between the attorneys for the respective parties that the time for

Claimant to file its record on appeal be and the same hereby is extended to and including September 18, 1933.

Dated, Buffalo, New York, Sept. 7, 1933.

Stanley & Gidley, Miller, Canfield, Paddock & Stone, Proctors for Libelant. George E. Brand, Burke & Desmond, Proctors for Claimant.

So ordered:

May C. Sickmon, Clerk, United States District Court Western District of New York.

(Stipulation and order in identical form entered into and filed in suit No. 1795.)

[fol. 318] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO PRINTING, ETC., IN SUITS 1794 AND 1795

In preparing the apostles on appeal and printing the rec-
[fol. 319] ord on appeal in each of the above suits it is stipulated that:

1. That verifications to Claims of Ownership and to Answers need not be included but such verification shall be noted.

2. As to suit No. 1795 there need not be included:

Exceptions of Claimant to Libel.
Order overruling said exceptions.
Answer.
Exceptions of Libelant to Answer.
Order as to such exceptions.

It shall be noted, however, that such Exceptions, Orders and Answers, in form identical with those filed and entered in suit No. 1794, were filed and entered in suit No. 1795.

3. Notice of taking depositions, certificate and return of notary thereon need not be included.

4. Exhibits 2, 1-A, 5, 6, 6-A, shall not be included.

Exhibit 9 shall not be included but description of such exhibit shall be included and the intended use of the proceeds of the bonds stated.

Exhibits 10, 11, 12 and 12-A shall not be included.

Exhibit 14 shall not be included but description of such exhibit shall be.

Exhibits 18, 18-A, 18-B, 18-C, 18-D, 18-E and 18-F shall not be included but notation describing said exhibits shall be.

Exhibits 20 and 21 shall not be included.

[fol. 320] Exhibit 27 shall not be included but notation shall be identifying it with mortgage attached to libel.

Exhibit 28 shall not be included but notation shall be identifying it with mortgage attached to libel.

Miller, Canfield, Paddock & Stone, Stanley & Gidley, (Proctors for Libelant). George E. Brand, Burke & Desmond, (Proctors for Claimant).

Dated August 9, 1933.

[fol. 321] IN UNITED STATES DISTRICT COURT

[Titles omitted]

No. 1794

No. 1795

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the District Court in each of the above entitled causes as agreed upon by the [fol. 322] parties and may be certified accordingly.

Dated September 16th, 1933.

Miller, Canfield, Paddock & Stone, Stanley & Gidley, Proctors for Libelant. George E. Brand, Burke & Desmond, Proctors for Claimant.

IN UNITED STATES DISTRICT COURT

ORDER DIRECTING FILING OF RECORD

On the consent of proctors for the respective parties the foregoing printed record is hereby ordered filed in lieu of the original papers for the purpose of certifying a record on appeal in each of the above entitled causes.

Dated September 18th, 1933.

Simon L. Adler, District Judge.

[fol. 323] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 324] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

Nos. 175, 176

Argued January 11, 1934. Decided February 5, 1934

DETROIT TRUST COMPANY, Trustee, Libelant-Appellee,

v.

The Steamer THOMAS BARLUM, Her Engines, etc; BARLUM STEAMSHIP COMPANY, Claimant-Appellant

DETROIT TRUST COMPANY, Trustee, Libelant-Appellee,

v.

The Steamer JOHN J. BARLUM, Her Engines, etc.; BARLUM STEAMSHIP COMPANY, Claimant-Appellant

Appeal from the District Court of the United States for the Western District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Suits in admiralty to foreclose preferred mortgages under the Ship Mortgage Act (46 USCA c. 25, §§ 911-984). Decree for libelant; claimant appeals. Reversed.

George E. Brand, of Detroit, Mich., and Burke & Desmond, of Buffalo, N. Y., for appellants.

Miller, Canfield, Paddock & Stone, of Detroit, Mich., and Stanley & Gidley, of Buffalo, N. Y., for appellees.

MANTON, Circuit Judge:

These suits in admiralty, tried together, were instituted to foreclose two ship preferred mortgages on appellant's vessels, the Thomas Barlum and John J. Barlum, each for $200,000. Each was a preferred mortgage, executed in the form required and filed pursuant to the Ship Mortgage Act (46 USCA §§ 911-984). The foreclosure of the mortgage lien was taken pursuant to section 30, subsec. K (46 USCA § 951).

The Barlum Steamship Company is a West Virginia corporation and owned these steamers plying the Great Lakes.

There were fourteen stockholders of the corporation. Of a total of 3,200 shares, 2,561 were held by John J. Barlum. This shareholder was interested in real estate holdings which were held in separate corporations. The steamship company had no stock interest or assets in any of these real estate corporations.

In February, 1929, the appellee, through its vice president, negotiated and consummated a loan of $200,000 secured by the mortgage on the Thomas Barlum now in suit, guaranteed by John J. Barlum. A document setting forth the agreement between the parties showed that $50,000 of the loan secured by this mortgage was to pay a note then outstanding, secured by a previous mortgage on the ship, $1,225 to pay interest, attorney's fees, fees due the trustee, cost of printing the bonds, and $100,000 to take up a debt of that amount owed by John J. Barlum and Thomas Barlum & Sons. The balance of about $42,775 was to be used for repairs and refitting the steamers Thomas Barlum and John J. Barlum for the seasons of 1929. The $100,000 debt of Barlum and Thomas Barlum & Sons had no relation to [fol. 325] the appellant or its vessels. The officer of appellee was fully informed of the details of the debt and that it was contemplated that it should be paid as stated. The mortgage was executed and delivered March 22, 1929, when the vessel was laid up. The appellant's home office was in Detroit, Mich., and an application, prepared by the appellee, was filed with the Securities Commission of that state stating that refinancing was the purpose of this issue. The sum of $42,896.44 given to the Barlum Steamship Company was placed in the bank account "Steamer John J. Barlum" at the National Bank of Commerce. There was paid out of it about $22,000 of the accounts relating to the John J. Barlum and $20,000 of the balance was transferred to the bank account "Steamer Thomas Barlum" at another bank, out of which were paid accounts allocated to the Thomas J. Barlum on account of its previous season's operations. A written authorization was given by the appellant to appellee to dispose in this manner of the proceeds of the bonds thus sold.

The mortgage on the John J. Barlum was executed January 5, 1928, after being prepared by the appellee's attorneys. It was understood that $82,281.25 was to be withheld by the appellee to pay $50,000 principal and $32,281.25

interest on a $1,250,000 bond issue and mortgage executed by John J. Barlum and his wife to the appellee trust company on individual real estate and leaseholds held by them and also $10,000 was to be retained by the trust company and applied to the payment of an individual note executed by Barlum for a personal loan from appellee. The appellant had no connection with these items of expense, and allowances to the trustee and the attorney, which were withheld according to the agreement. From the remainder there was paid to the engineer of the Thomas Barlum $500; $500 was paid to the captain of the John J. Barlum; $2,000 was transferred to the account "Steamer John J. Barlum"; and the balance was used to pay off loans made to Barlum and his companies other than appellant. Thus, out of the entire proceeds of the issue, but $2,500 transferred to the account of the John J. Barlum or used in connection with it.

It is admitted that there was a default in each of the mortgages, which contained provisions for foreclosure by seizure and sale without legal process.

Appellant contends that subsection K of the Ship Mortgage Act (section 30, subsec. K, Merchant Marine Act of 1920, 46 USCA § 951) allowing foreclosure of the vessels' preferred mortgages in admiralty, does not apply. And if subsection K does apply, it is contended that it is unconstitutional and not within article three, § 2, of the Constitution, providing that the judicial power shall extend to all cases of admiralty and maritime jurisdiction. Congress, by section 9 of the Judiciary Act of 1789, conferred such jurisdiction on the District Courts saving to suitors in all cases the right to a common-law remedy where the common law is competent to give it (28 USCA § 41, subd. 3).

The Merchant Marine Act of June 5, 1920, section 30 of which is called the Ship Mortgage Act, had as its purpose, expressed in section 1 of the act (46 USCA § 861), the development of a merchant marine and the disposal of the vessels and shipping property held by the United States Shipping Board. In furtherance of that purpose, section 30 of the act (46 USCA § 911 et seq.) provided generally for the recordation of ship mortgages and especially for the creation and enforcement of a class of preferred mortgages in order that the rights of both mortgagees and

others dealing with United States vessels might be clearly defined. It was hoped that regulation of ship mortgages would attract capital to shipping. Senate Reports, vol. 1, 66th Congress, 2d Session. These preferred mortgages were utilized as the security taken by the Board in the form of purchase-money mortgages in cases of sales of vessels by the Board. Morse Drydock & Repair Co. v. Northern Star, 271 U. S. 552, 46 S. Ct. 589, 70 L. Ed. 1082; The Oconee (D. C.) 280 F. 927.

Subsection D of section 30 (46 USCA § 922) provides how a valid mortgage may obtain a preferred status. Subsection K (46 USCA § 951) provides for enforcing the mortgage by a suit in rem in admiralty.

Appellant argues that these mortgages, as the record establishes, were so devoid of connection with maritime purposes and subjects, that the statute should not be construed to confer and cannot confer original jurisdiction of foreclosure in admiralty. It is not disputed that Congress may legislate to confer such jurisdiction as to true maritime liens (Morse Drydock & Repair Co. v. Northern Star, supra; Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285, 76 L. [fol. 326] Ed. 598; The Nanking [D. C.] 292 F. 642), but Congress has no power to confer jurisdiction in admiralty to litigate a nonmaritime contract. The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345; The Lottawanna, 21 Wall. (88 U. S.) 558, 22 L. Ed. 654; Schuchardt v. The Angelique, 19 How. (60 U. S.) 239, 15 L. Ed. 625; People's Ferry Co. v. Beers, 20 How. (61 U. S.) 393, 15 L. Ed. 961; Bogart v. The Steamboat John Jay, 17 How. (58 U. S.) 399, 15 L. Ed. 95; The Genesee Chief, 12 How. (53 U. S.) 443, 13 L. Ed. 1058; Pillsbury Flour Mills Co. v. Interlake S. S. Co., 40 F. (2d) 439 (C. C. A. 2). And Congress did not intend to conflict with the rights of the state tribunals to enforce contracts governed by their own laws and not strictly of a maritime nature.

If it were established that these mortgages were given to support an issue of bonds "to develop and encourage the maintenance of such a merchant marine" and therefore in accord with the objects of the Ship Mortgage Act, the admiralty jurisdiction to foreclose would be unquestionable. We need not decide whether or not a loan made for maritime purposes secured by a mortgage on a ship will become nonmaritime if the borrower, contrary to the agreement of

the mortgage, diverts the money to nonmaritime purposes, nor need we consider what effect any estoppel in such a case would have. We are not called upon to say whether or not Congress could in any event extend the admiralty jurisdiction to a matter so closely related to transportation by navigable waters as to provide for the exclusive enforcement in admiralty of a mortgage on a ship actually engaged in such transportation. It is sufficient to point out here that the mortgagor and mortgagee both knew in advance of making these mortgages that the moneys advanced were not to be used for such purposes, but were intended for and actually were used for nonmaritime purposes. This was fully disclosed at the trial. In the absence of an express provision, the Ship Mortgage Act will not be construed to extend to such a case.

It has been recognized that the determination of what is a maritime contract depends upon the nature of the contract which means its substance. North Pac. S. S. Co. v. Hall Bros. Machine Ry. & Shipbuilding Co., 249 U. S. 119, 39 S. Ct. 221, 63 L. Ed. 510. Contracts of a mixed nature are not cognizable in the admiralty courts, and, where the principal subject-matter of the controversy belongs to the jurisdiction of a court of common law or of equity, the incidental matters must always be relegated to the appropriate jurisdiction, although of themselves they may be cognizable in admiralty. The Pennsylvania, 154 F. 9 (C. C. A. 2). The whole contract must be maritime in its character, and, when the performance is partly maritime and partly terrene, a court of admiralty will not assume jurisdiction over it unless the nonmaritime features be inconsiderable. Pillsbury Flour Mills Co. v. Interlake S. S. Co., supra; The Poznan, 9 F. (2d) 838 (C. C. A. 2); The Richard Winslow, 71 F. 426 (C. C. A. 7). In Crowell v. Benson, 285 U. S. 22, 55, 52 S. Ct. 285, 294, 76 L. Ed. 598, it was said: "In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction. * * * Again, it cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases, regardless of particular circumstances or relations."

It was not the intention of Congress, by the mere grant of jurisdiction under the terms of the Ship Mortgage Act, to confer jurisdiction on the federal court to foreclose a mortgage lien placed on the vessel which was not made a maritime lien for navigation or shipping purposes within the statute. In granting such jurisdiction, Congress could have intended only a valid preferred mortgage thus authorized to be made under the terms of the Ship Mortgage Act. It must be a transaction which relates to navigation and things maritime.

It is not enough to say that they were mortgages with due formalities placed upon the vessels. As soon as it appeared at the trial, and it did so beyond question, that the loan was not made to be used for purposes of navigation or relating to things maritime, the court should have declined jurisdiction. In The Winnebago, 141 F. 945, 949 (C. C. A. 6), the court said: "The owner of a ship may make a nonmaritime contract and mortgage his ship to secure it, or it may be seized on mesne or final process; and [fol. 327] in both cases the ship may be sold for the satisfaction of the debt on the order of a common-law court without recourse to the admiralty jurisdiction." And this alone can be the remedy of the mortgage once its nonmaritime character is disclosed.

The act, to be sure, does not say anything about how this loan secured by the mortgage, is to be used. But a maritime use or some use aiding the purpose of the statute was contemplated, and, when the parties negotiate a loan foreign to that purpose, the mortgage securing the loan is not within the act, even though the formalities are observed so far as admiralty jurisdiction is concerned for foreclosure. Nowhere in the Merchant Marine Act or the Ship Mortgage Act is it anywhere shown that Congress intended that ship mortgages given by owners to support outside operations such as real estate ventures or to pay past debts not arising in maritime transactions were in contemplation. Mortgage loans of this character are foreign to the idea of maritime operations. The mortgages in question having been shown to be nonmaritime in intent and character, the admiralty court did not have jurisdiction, and the application to dismiss the suit should have been granted.

Decree reversed.

Augustus N. Hand, dissents with opinion.

[fol. 328] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

Nos. 175, 176

Argued January 11, 1934. Decided February 5, 1934

DETROIT TRUST COMPANY, Trustee, Libelant-Appellee,

v.

The Steamer THOMAS BARLUM, Her Engines, etc.; BARLUM STEAMSHIP COMPANY, Claimant-Appellant

DETROIT TRUST COMPANY, Trustee, Libelant-Appellee,

v.

The Steamer JOHN J. BARLUM, Her Engines, etc.; BARLUM STEAMSHIP COMPANY, Claimant-Appellant

Appeal from the District Court of the United States for the Western District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

AUGUSTUS N. HAND, Circuit Judge (dissenting):

The question before us on this appeal is whether two mortgages, one on the steamer Thomas Barlum, and the other on the steamer John J. Barlum, belonging to the Barlum Steamship Company, are preferred mortgages constituting liens upon the mortgaged vessels which may be enforced by suit in rem in admiralty pursuant to the Ship Mortgage Act (46 U. S. C. A. § 911 et seq.).

Each mortgage was made by the Barlum Steamship Company after proper corporate action authorizing its execution and in all respects complied with the provisions of the Ship Mortgage Act as to recording in the office of the collector of customs, indorsement upon the vessel's documents and filing of the required statutory affidavit that the mortgage was made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel. The resolutions of the board of directors of the corporation which authorized the execution of the mortgages recited

that it was necessary to borrow the amounts to be secured by the respective mortgages "for the use and benefit" of the steamer that was mortgaged.

The objection made to each of these indentures as a "preferred mortgage" is that the mortgagee advanced money to the mortgagor knowing that the greater part of it would not be used for any maritime purpose, but would be employed to pay off prior debts of the mortgagor to the Detroit Trust Company, as well as to pay indebtedness to the trust company of others than the mortgagor.

The Detroit Trust Company purchased the bonds of which these mortgages were the security and thereafter sold them to the public or held them as investments for various estates of which it was the trustee.

The appellants contend (a) that the Ship Mortgage Act never authorized mortgages to be given the status of preferred mortgages if made for nonmaritime purposes; (b) that, if it did, the act was, to that extent, unconstitutional; (c) that a mortgage made for a nonmaritime purpose cannot be foreclosed in a United States District Court.

[fol. 329] It seems reasonably clear that the Ship Mortgage Act renders all mortgages upon the whole of any vessels of 200 gross tons and upwards that are documented under the laws of the United States preferred mortgages, provided they are valid mortgages and the owner has complied with the provisions of subsection D of section 30, cf. the Ship Mortgage Act (46 U. S. C. A. § 922).

Inasmuch as the mortgages we are dealing with were duly authorized and executed by the corporation that owned the vessels, they were unquestionably valid as mortgages, and, since the owner complied with all the provisions of subsection D of the Ship Mortgage Act relating to preferred mortgages, they attained a preferred status.

Section 1 of the Merchant Marine Act (46 U. S. C. A. § 861) declares it "to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of * * * a merchant marine of the best equipped and most suitable types of vessels. * * *" In the light of this recital, it is argued that the mortgages here should not be accorded the status of preferred mortgages for the reason that the moneys advanced upon the vessels were largely used for purposes having no relation to the building or repairing of ships, and almost all the transac-

tions connected with the use of the advances were outside of the objects which Congress had in mind when it created a preferred class of mortgages on ships.

But it cannot fairly be said that the only way to develop and encourage a merchant marine is to follow closely the traditional path of the admiralty law and to give mortgage liens upon vessels priority over maritime liens in no cases except where contracts are involved that are maritime in the sense sanctioned under the general doctrines of admiralty law. It may well be that the building of ships and the investment of capital therein can best be promoted by allowing vessels to be hypothecated as readily and with the same effect as other personal property. If ship mortgages are accorded such a status, there is ground for supposing that they can be employed more advantageously than heretofore.

Prior to the passage of the Ship Mortgage Act, the Senate Committee had reported that "mortgage security on ships now is practically worthless." It may be that the unrestricted right to impose first liens on ships is as likely to promote investment in shipbuilding as is the unrestricted right to mortgage real estate to encourage investment in lands and building. In each case complete freedom to give an underlying lien may tend to enlarge the field to commercial enterprise. Individuals or corporations may be far more ready to build or to buy ships if they know that they can raise money needed for any purpose by placing a mortgage lien upon such vessels that will not be subject to future maritime claims.

Moreover, a mortgage on a ship will always be a most undesirable security if those purchasing the bonds which it secures must at their peril go beyond the corporate resolutions authorizing the mortgage and ascertain aliunde how moneys advanced upon the mortgage are to be spent. These difficulties disappear, and the investment becomes in fact what it purports to be in form if, in order to give a mortgage priority, it is only necessary that it be properly authorized and executed and that the provisions of the statute respecting it be complied with. Such data can be ascertained from the corporate and public records by the same sort of examination that is made to discover whether a chattel mortgage is valid. In other words, a purchaser

of bonds secured by a mortgage on a ship will not have to look into matters dehors the record and unravel all sorts of transactions that may have occurred between the mortgagor and mortgagee before he can learn the real nature and extent of his security. As soon as the mortgagor records his mortgage in the proper office and takes the other steps prescribed by the act, it becomes ipso facto a preferred mortgage. To make its status depend upon the purposes for which it is given is to engraft upon the plain words of the statute an exception which seems to be contrary to its terms and to be required by no convincing reasons of public policy.

To limit the lawful incidence of preferential mortgages to securing priorities for sums advanced for the purchase, building, repairing, or fitting out of ships would often seriously interfere with refinancing by corporations engaged in shipping which might be vital to their needs, such as placing preferred mortgages on vessels in order to pay off existing overdue mortgages having no preferential status.

I think it manifest that by the Ship Mortgage Act Con- [fol. 330] gress provided means for giving any valid mortgage a preferred status and that the mortgages now under consideration are, within the meaning of that act, preferred mortgages.

But it is said that Congress had no power to give mortgages securing sums to be used for nonmaritime purposes a preferential status. This contention is based upon the decisions of the Supreme Court in Bogart v. The Steamboat John Jay, 17 How. 399, 15 L. Ed. 95; Schuchardt v. Ship Angelique, 19 How. 239, 15 L. Ed. 625; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654 and The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345, where it was held that a mortgage upon a ship was not a maritime contract and might not be foreclosed in admiralty. Indeed, this was the former rule in admiralty of the English courts. The Neptune, 3 Hagg. Adm. 132. But, at the times when these decisions were rendered, there was no statute of the United States authorizing the imposition of a preferred mortgage lien or providing for foreclosure in admiralty.

Subsection K of section 30 of the Ship Mortgage Act (46 U. S. C. A. § 951) specifically provides that:

"Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty.

"Original jurisdiction of all such suits is granted to the district courts of the United States exclusively."

In Bogart v. The Steamboat John Jay, 17 How. 399, 402, 15 L. Ed. 95, while the Supreme Court refused to sustain a libel founded upon a mortgage on the steamer John Jay, it adverted to the enlargement of admiralty jurisdiction in England which had then recently occurred through the enactment of legislation relating to mortgages on ships and recognized that Congress had similar power which it might exercise when it chose. Wayne, J., said:

"It is true that the policy of commerce and its exigencies in England have given to its admiralty courts a more ample jurisdiction in respect to mortgages of ships, than they had under its former rule, as that has been given in this opinion. But this enlarged cognizance of mortgages of ships has been given there by statute- 3 and 4 Victoria, ch. 65. Until that shall be done in the United States, by Congress, the rule, in this particular, must continue in the admiralty courts of *of* the United States, as it has been."

Again in White's Bank v. Smith, 7 Wall. 646, 655, 19 L. Ed. 211, the Supreme Court expressed a similar view when referring to the act of Congress requiring the recording of mortgages on ships in order to give notice thereof to others than the mortgagor, his heirs and devisees. Nelson, J., said:

"Some question is made as to the power of Congress over the title and property of vessels of the United States to such an extent as to enable it to pass a recording act.

"But, after the regulation of this species of property by the several acts of Congress to which we have referred, and in respect to which there has never been a question, there can be very little hesitation in conceding the power to protect the rights of subsequent bona fide purchasers and mortgagees therein."

Article 3, § 2, of the Constitution, extends the judicial power to "all Cases of admiralty and maritime Jurisdiction." The "admiralty and maritime Jurisdiction" is limited to such matters as fall within the reasonable mean-

ing of these words. But within the "admiralty and maritime" sphere Congress has the power to "alter, qualify or supplement" the maritime law both in substance and procedure "as experience or changing conditions * * * require" (Panama R. R. Co. v. Johnson, 264 U. S. at page 386, 44 S. Ct. 391, 393, 68 L. Ed. 748), and has exercised this power again and again. It vitally modified both substantive law and procedure by the enactment of the statute for limitation of liability. Perhaps the widest revision of earlier doctrine for the supposed encouragement of the shipping industry occurred when the Supreme Court in Richardson v. Harmon, 222 U. S. 96, 32 S. Ct. 27, 56 L. Ed. 110, allowed the owners of a barge which had come into collision with a railroad bridge across a navigable stream to limit their liability, though it had long been settled law that the tort was nonmaritime and not within the cognizance of an admiralty court. The Plymouth, 3 Wall. 20, 18 L. Ed. 125; The Troy, 208 U. S. 321, 28 S. Ct. 416, 52 L. Ed. 512. Important modifications of the maritime law were effected through the incorporation in the Merchant Marine Act of 1920 (46 U. S. C. A. § 861 et seq.), of the Federal Employers' Liability Act (45 U. S. C. A. §§ 51-59), and through the [fol. 331] Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. §§ 901-950).

It is argued that the language of the Chief Justice in Crowell v. Benson, 285 U. S. at page 55, 52 S. Ct. 285, 294, 76 L. Ed. 598, indicates that the power of Congress to amend and revise the maritime law is so limited that a preferred status cannot be given by the Ship Mortgage Act to mortgages for advances to be employed for other than maritime purposes. But I can see nothing in the opinion that bears out this contention. It is merely said that "Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction," and that unless the injuries to which the Longshoremen's Act relates occurred upon the navigable waters of the United States, they fall outside that jurisdiction. This is no more than saying that, if the injury to the employee occurred on land, the cause of action was not maritime, whatever may have been the relation of the employee to maritime affairs. I cannot see how it can be inferred from this that Congress lacks power to subordinate maritime liens to mortgages which have been placed upon ships. A ship is not only the very symbol, but the instrument, of martime jurisdiction,

and the same power which can amend the maritime law by imposing a lien for supplies furnished at a home port may subordinate maritime liens to a mortgage which the owner of the vessel has placed upon it. The whole matter is one of creating and displacing liens upon ships which are essentially marine instrumentalities and over which Congress under its maritime jurisdiction has complete control. That it cannot determine what is best to promote the development of these instrumentalities and to regulate their use seems to me quite incredible.

If Congress in the exercise of its jurisdiction has the power to impose liens that are new to the maritime law and to limit liabilities that are old, it may surely provide for the enforcement of such liens in the courts of the United States.

No question has been raised as to the validity of the mortgages as such. The only defense to the libels is that the mortgages gave rise to no maritime lien, are entitled to no status as preferred mortgages, and cannot be enforced in a court of admiralty. I have attempted to show why this is not so. In my opinion, the decrees ordering sales for the satisfaction of the liens of the mortgages should be affirmed.

[fol. 332] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 13th day of February, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

DETROIT TRUST COMPANY, as Trustee, etc., Libellant-Appellee,

vs.

S. S. "THOMAS BARLUM," BARLUM STEAMSHIP COMPANY, Claimant-Appellant

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for

the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 333] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Detroit Trust Company, as Trustee, vs. S. S. "Thomas Barlum." Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 13, 1934. William Parkin, Clerk.

[fol. 334] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 13th day of February, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

DETROIT TRUST COMPANY, as Trustee, etc., Libellant-Appellee,

vs.

S. S. "JOHN J. BARLUM," BARLUM STEAMSHIP COMPANY, Claimant-Appellant

Appeal from the District Court of the United States for the Western District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fols. 335-347] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Detroit Trust Company, as Trustee, etc. vs. S. S. "John J. Barlum." Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 13, 1934. William Parkin, Clerk.

[fol. 348] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

DETROIT TRUST COMPANY, Trustee, Libelant-Appellee,

against

Steamer THOMAS BARLUM, Her Engines, etc.; BARLUM STEAMSHIP COMPANY, Claimant-Appellant

DETROIT TRUST COMPANY, Trustee, Libelant-Appellee,

against

Steamer JOHN J. BARLUM, Her Engines, etc.; BARLUM STEAMSHIP COMPANY, Claimant-Appellant

PETITION FOR REHEARING

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

Miller, Canfield, Paddock & Stone, Esqs.; Stanley & Gidley, Esqs., Proctors for Petitioner.

Per CURIAM:

Petition for rehearing denied.

—— ——, Circuit Judges.

[fol. 349] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 13th day of March, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

DETROIT TRUST COMPANY, as Trustee, etc., Libellant-Appellee,

vs.

S. S. "THOMAS BARLUM," BARLUM STEAMSHIP COMPANY, Claimant-Appellant (and another case)

A petition for a rehearing having been filed herein by counsel for the appellee;

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

Wm. Parkin, Clerk.

[fol. 350] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Detroit Trust Company, as Trustee, etc., vs. S. S. "Thomas Barlum." Order. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 12, 1934. William Parkin, Clerk.

[fol. 351] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 350, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Detroit Trust Company as Trustee, etc., Libellant-Appellee, against S. S. "Thomas Barlum," Barlum Steamship Company, Claimant-Appellant (and other case), as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 12th day of March, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 352] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 909

ORDER ALLOWING CERTIORARI—Filed April 30, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

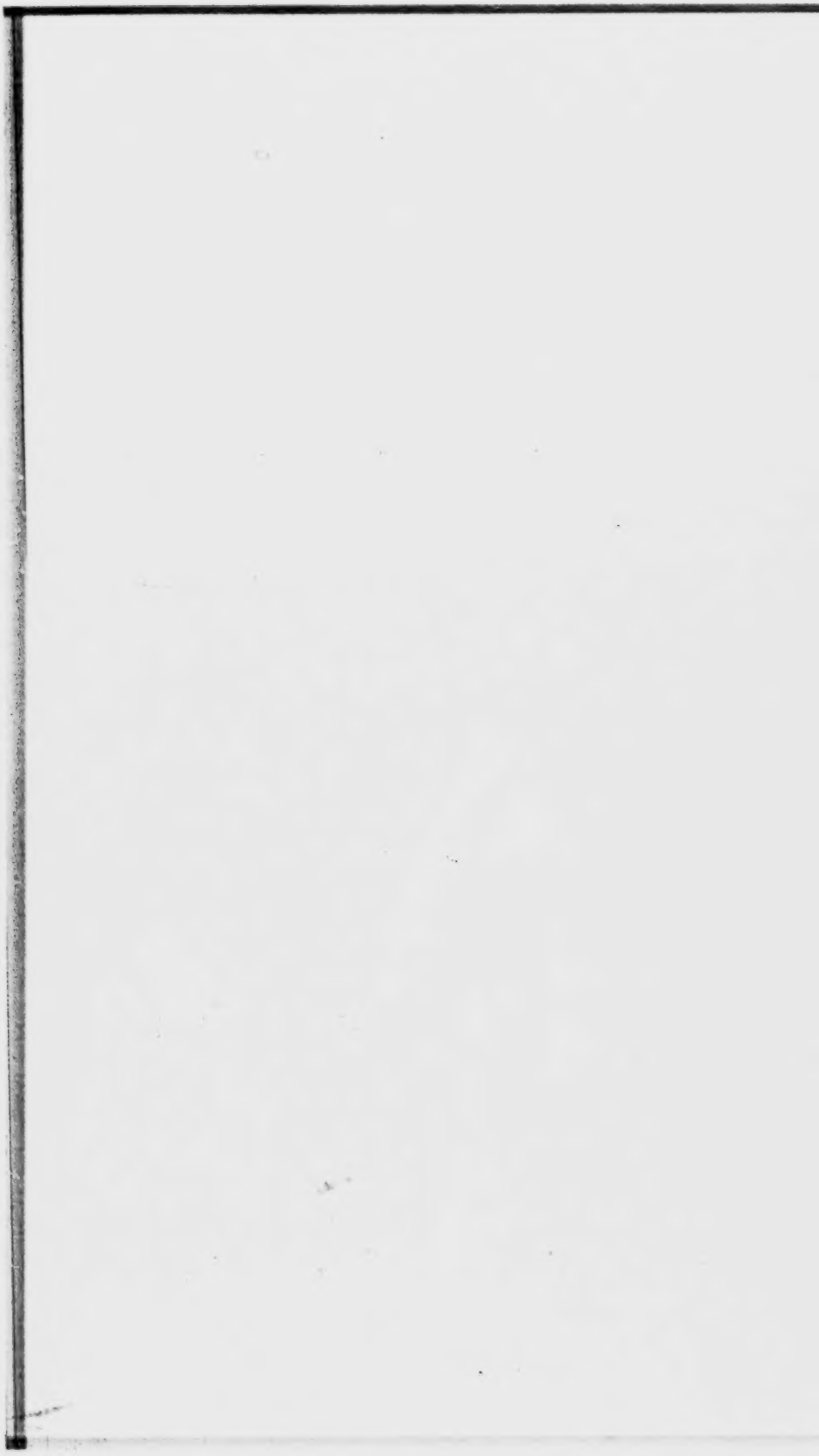
[fol. 353] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 910

ORDER ALLOWING CERTIORARI—Filed April 30, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 38,512, 38,513. U. S. Circuit Court of Appeals, Second Circuit. Term No. 909. Detroit Trust Company, Trustee, Petitioner, vs. Steamer "Thomas Barlum," her engines, etc., Barlum Steamship Company. Term No. 910. Detroit Trust Company, Trustee, Petitioner, vs. Steamer "John J. Barlum," her engines, etc., Barlum Steamship Company. Petition for writs of certiorari and exhibit thereto. Filed March 30, 1934. File Nos. 909, O. T., 1933; 910, O. T., 1933.



17

FILE COPY

MAR 30 1
CHARLES ELMORE
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 909 No. 910

DETROIT TRUST COMPANY, TRUSTEE,
Petitioner,

against

Steamer THOMAS BARLUM, her engines, etc., Barlum Steamship Company,
Respondent.

DETROIT TRUST COMPANY, TRUSTEE,
Petitioner,

against

Steamer JOHN J. BARLUM, her engines, etc., Barlum Steamship Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RAY M. STANLEY,
ELLIS H. GIDLEY,
FERRIS D. STONE,
Counsel for Petitioners.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

	Page
PETITION FOR WRIT OF CERTIORARI	1
The Nature of the Case	2
The Questions Presented:	8
1. Was it the intention of Congress in enacting Subsection K of the Ship Mortgage Act to withhold jurisdiction of an action in rem brought to foreclose a preferred mortgage in all cases where the mortgagor and mortgagee knew in advance that a substantial part of the proceeds was to be devoted to non-maritime uses?	8
2. Can jurisdiction of a District Court over an action in rem brought under Subsection K of the Ship Mortgage Act be defeated without destroying the status of a mortgage as a preferred mortgage under the Ship Mortgage Act?	8
3. If Congress intended to create a preferred mortgage lien in all cases where the provisions of the Ship Mortgage Act are strictly complied with, irrespective of the devotion of the proceeds to non-maritime uses, has it the power so to do under Article III, Section 2 of the Constitution?	8
Reasons for Allowance of Writ	12
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	16
Jurisdiction	16
Statement	17
Specifications of Error	17
POINT I—The Ship Mortgage Act contains no express or implied condition that the proceeds of a preferred mortgage shall be devoted to maritime uses. Therefore, an intention to use the proceeds of such a mortgage for non-maritime purposes cannot affect the status of the mortgage, or the jurisdiction of the District Court to enforce it	18
POINT II—The Ship Mortgage Act is a valid exercise of the power granted to Congress under Article III, Section 2 of the Constitution	26
POINT III—If the mortgages in suit are preferred mortgages under the Act, the jurisdiction of the District Court over an action in rem to enforce them necessarily follows	31
POINT IV—Estoppel bars the defense and renders the testimony on which the majority opinion rests wholly incompetent	34
CONCLUSION	35

TABLE OF CASES CITED.

Bogart v. S/S JOHN JAY, 17 How. 399	14, 28, 30
BREYER, THE HENRY W., 17 Fed. (2d) 423 (D. Maryland)	10
Consumer's Co., v. Goodrich Transit Co., 53 F. (2d) 972 (C. C. A. 7) Cert. denied 286 U. S. 548	10

Page

EGERIA, THE 294 F. 791 (C. C. A. 9) 10
LINCOLN LAND, THE 295 F. 358 (D. Mass.) 9, 28
LOTTAWANNA, THE 21 Wall. 558 ..... 15, 27, 28
Morse Dry Dock & Repair Company v. S/S THE NORTHERN STAR, 271 U. S. 552, 556 ..... 9, 28
MOSHULU, 298 F. 348 (N. D. Cal.) 10
NANKING, THE 292 F. 642 (N. D. Cal.) 9, 28
National Bank v. Enterprise Marine Dock Co., 43 F. (2d) 547 (C. C. A. 4) 10
NORTHERN, THE No. 41, 297 F. 343 (S. D. Florida) 10
NORTHERN STAR, 7 F. (2d) 505 (C. C. A. 2) 10
OCONEE, The 280 F. 927 (E. D. Virginia) 9, 27, 28
OWEGO, The 292 F. 403 (E. D. La.) 10
Panama R. R. Co., v. Johnson, 264 U. S. 375 26
Peoples Ferry Co., v. Beers, 20 How. 393 ..... 15, 28
Perry v. Haines, 191 U. S. 17 29
RED LION, THE 22 F. (2d) 329 (E. D. N. Y.) 10
Richardson v. Harmon, 222 U. S. 96 30
RUMBELL, THE J. E. 148 U. S. 1 ..... 15, 28
Schuchardt v. Babbage, 19 How. 239 15
Southern Pacific Co., v. Jansen, 244 U. S. 205 27
White's Bank v. Smith, 7 Wall. 646 ..... 31, 32

AUTHORITIES CITED.

Act of March 3, 1851 (Ch. 43, 9 Stat. 635, 636) 29
Act of June 26, 1884 (Ch. 121, Sec. 18; 23 Stat. 57, 46 U. S. C. 189) 29
Act of June 23, 1910 (Ch. 373, 36 Stat. 604) 29
Article I, Section 8 of the Constitution of the United States 26
Article III, Section 2 of the Constitution of the United States 2, 8, 12, 16, 26
Judicial Code, Section 240, as amended by the Act of Feb. 13, 1925 (43 Stat. 938, U. S. C. A. Title 28, Sec. 347) 16, 17
Judiciary Act of 1789 (Act September 24, 1789, Sec. 9, 1 Stat. 76) 29
Merchant Marine Act of 1920 (Act of June 5, 1920, Ch. 250, Sec. 1; 41 Stat. 988; 46 U. S. C. Sec. 861) 24
Senate Reports, Volume I, 66th Congress 2nd Session 24
Ship Mortgage Act (Act of June 5, 1920, Ch. 250, Sec. 30; 41 Stat. 1000-1006; 46 U. S. C. Ch. 25 ..... 2, 6, 11, 13, 18, 24, 26, 27, 28, 31, 33, 35
Subsection D (41 Stat. 1000, 46 U. S. C. Sec. 922) 8, 18, 21, 23
Subsection E (41 Stat. 1001; 46 U. S. C. Sec. 923) 9
Subsection K (41 Stat. 1003; 46 U. S. C. Sec. 951) 3, 8, 10, 13, 17, 20, 32
Subsection M (41 Stat. 1004; 46 U. S. C. Sec. 953) 8, 19, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No.....

DETROIT TRUST COMPANY, TRUSTEE,
Petitioner,

against

Steamer THOMAS BARLUM, her engines, etc., Barlum Steamship Company,
Respondent.

DETROIT TRUST COMPANY, TRUSTEE,
Petitioner,

against

Steamer JOHN J. BARLUM, her engines, etc., Barlum Steamship Company,
Respondent.

THE PETITION OF DETROIT TRUST COMPANY, TRUSTEE, FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petition.

Your petitioner, Detroit Trust Company, Trustee, mortgagee named in each of two preferred marine

mortgages covering the Steamers *Thomas Barlum* and *John J. Barlum,* respectively, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review its orders entered in the above entitled causes on February 13th, 1934 (R. 336-338) reversing the decrees of the United States District Court for the Western District of New York. Neither the prevailing nor dissenting opinions of the Circuit Court of Appeals (R. 324-329, 330-336) are yet officially reported. The original opinion of the District Court upon exceptions (R. 120-121) is reported at 56 Fed. (2d) 455, and the subsequent opinion of the District Court following trial of the causes (R. 264-267) is reported at 2 Fed. Supp. 733.

Nature of the Case.

These suits in admiralty, tried together, were instituted by petitioner for the foreclosure, following default, of two preferred marine mortgages covering the Steamers *Thomas Barlum* and *John J. Barlum,* respectively, given pursuant to the Ship Mortgage Act (Act June 5, 1920, Chap. 250, Sec. 30; 41 Stat. 1000-1006; 46 U. S. C. Chap. 25). The suits were resisted on the ground that the proceeds of the mortgages being largely intended and used for non-maritime purposes no maritime lien subject to admiralty jurisdiction arose therefrom, and that the Ship Mortgage Act 1920, insofar as it purports to permit the foreclosure of such mortgages by suit *in rem* in admiralty and to grant original jurisdiction of such suits to the District Courts of the United States is violative of and in contravention of Article III, Section 2, of the Consti-

tution of the United States and is null, void and of no effect (R. 124-125).

Full compliance with all statutory requirements to make each mortgage a preferred mortgage under the Ship Mortgage Act is admitted by the respective answers.

Each preferred mortgage was given to secure payment of a loan of $200,000 made by Detroit Trust Company to the vessel owner. Each loan was evidenced by an issue of bonds aggregating that sum and maturing serially. The bond issues were purchased by Detroit Trust Company for sale to the general public and were largely so sold. Default occurred in payment of each issue of bonds, whereupon libelant invoked the jurisdiction of the District Court, pursuant to Subsection K of the Ship Mortgage Act (41 Stat. 1003; 46 U. S. C. Sec. 951) for the enforcement of the lien of each preferred mortgage.

John J. Barlum was the principal and controlling owner of stock in the mortgagor corporation when the mortgages in suit were negotiated and delivered (R. 196-199, 250).

Of the proceeds of the mortgage given on the *Thomas Barlum*, the testimony, which is without dispute, shows that the Detroit Trust Company (Mortgagee, Trustee) disbursed the proceeds of the mortgage in exact conformity with the written directions supplied by the mortgagor, as follows:

$50,358.33 for the refunding of the unpaid balance of a prior existing mortgage, also exe-

cuted and delivered under the provisions of the Ship Mortgage Act.

$45,510.00 for the payment of a note of Thomas Barlum & Sons (a corporation controlled by John J. Barlum, President of the mortgagor).

$54,490.00 for the payment of two notes of John J. Barlum.

$ 1,545.23 for the payment of miscellaneous expenses in connection with the giving of the mortgage.

$42,896.44 the residue, was paid to the mortgagor (R. 231).

Of the proceeds of the *John J. Barlum* mortgage, there is nothing in the record to indicate that the Detroit Trust Company (Mortgagee, Trustee) had advance knowledge of the manner in which the balance of the proceeds of the mortgage turned over to the mortgagor and amounting to substantially more than half such proceeds were to be used. After the mortgage was executed, delivered and recorded, the Detroit Trust Company (Mortgagee, Trustee) disbursed the moneys in exact conformity with the express directions in writing of the mortgagor, as follows:

$ 92,363.38 for the payment of note, bonds and coupons of John J. Barlum.

After deduction of miscellaneous expenses connected with the mortgage, there was paid to the mortgagor a balance of

$102,801.55 (R. 240).

The testimony fairly shows that the several amounts paid to others than the mortgagor, as indicated, were

paid by the express direction of the mortgagor and merely constituted loans made by the mortgagor out of the proceeds (R. 194, 207).

The libels respectively allege the execution and delivery of the preferred mortgages (as intended to be such) to secure payment of the indebtedness evidenced by each bond issue. A complete and strict compliance with the Ship Mortgage Act is alleged. Default is pleaded and relief is sought by sale of the respective vessels and decree of foreclosure thereon (R. 12-15, 66-69).

Upon the filing of the libels and seizure of the respective vessels at the Port of Buffalo, Barlum Steamship Company made claim thereto and attacked the jurisdiction of the District Court through exceptions. After hearing, the exceptions were overruled by the District Court (R. 123). Claimant then interposed answers which *admit* every allegation of the libels. Two separate defenses are therein alleged; the first of which alleges that the proceeds of the loans, as evidenced by an issue of bonds to secure payment of which the respective mortgages were given, were used by claimant (Mortgagor) almost entirely for non-maritime purposes to the knowledge of libellant when the mortgages were executed and delivered. The second defense is the same as was urged by exceptions (R. 124-125).

Testimony was taken and trial of both causes had upon the issue raised by such first defense. A further opinion was filed by the District Court upholding the

right to enforce the respective preferred mortgages in a Court of Admiralty as provided by the Ship Mortgage Act. Decrees were entered in the respective suits providing for foreclosure and directing the sale of the vessels to satisfy the amounts found to be due (R. 268, 280). Claimant appealed and the Circuit Court of Appeals, by a divided court, reversed the decrees of the District Court. Petitions for rehearing were subsequently denied (R. 338, 339).

In determining that the jurisdiction provided by the Ship Mortgage Act did not extend to the mortgages at bar, the prevailing opinion of the Circuit Court of Appeals (Manton and Chase, C. J.) held:

1. That the jurisdiction of the District Court over an action *in rem* to foreclose a preferred mortgage complying with all the express provisions of the Ship Mortgage Act may be collaterally attacked by the mortgagor and jurisdiction defeated by showing that the mortgagor and mortgagee had advance knowledge that a substantial part of the proceeds of the mortgage were to be used for non-maritime purposes.

2. That the result follows notwithstanding the libel alleges and the answer admits that the mortgage in question is a preferred mortgage under the Act.

3. That admiralty jurisdiction over the foreclosure of preferred mortgages on vessels is limited to mortgages the proceeds of which were used "to develop and encourage the maintenance of a merchant marine" (R. 324-329).

Petitioner contended below, and now contends, that this construction is an unwarranted and narrow limita-

tion of the Ship Mortgage Act, and that the correct construction is that set forth in the dissenting opinion of the Circuit Court of Appeals (A. N. Hand, C. J.) which held:

1. That since each mortgage admittedly was a valid mortgage, and since the owner (Mortgagor) in all respects complied with the provisions of the Ship Mortgage Act relating to preferred mortgages, each mortgage attained a preferred status.

2. That the Ship Mortgage Act was passed in aid of the development and encouragement of our merchant marine, and was intended to give to ship mortgages complying with the statute a status permitting their more advantageous employment by way of promotion of investment than had been theretofore enjoyed.

3. That to make the status of a preferred mortgage depend upon the purposes for which it is given is to engraft upon the plain words of the statute an exception seemingly contrary to its terms and not required by any convincing public policy.

4. That the whole matter is one of the creation and displacement of liens upon ships as essential marine instrumentalities over which Congress has complete control under its power to alter, qualify or supplement the maritime law.

5. That the mortgages in suit being admittedly valid as preferred mortgages, the admiralty court had jurisdiction and the decrees ordering sales of the vessels for the satisfaction of the liens of the mortgages should be affirmed (R. 330-336).

Questions Presented.

1. Was it the intention of Congress in enacting Subsection K of the Ship Mortgage Act to withhold jurisdiction of an action *in rem* brought to foreclose a preferred mortgage in all cases where the mortgagor and mortgagee knew in advance that a substantial part of the proceeds was to be devoted to non-maritime uses?

2. Can jurisdiction of a District Court over an action *in rem* brought under Subsection K of the Ship Mortgage Act be defeated without destroying the status of a mortgage as a preferred mortgage under the Ship Mortgage Act?

3. If Congress intended to create a preferred mortgage lien in all cases where the provisions of the Ship Mortgage Act are strictly complied with, irrespective of the devotion of the proceeds to non-maritime uses, has it the power so to do under Article III, Section 2 of the Constitution?

The Ship Mortgage Act is unconditional in form. By Subsection D (41 Stat. 1000, 46 U. S. C. Sec. 922) it is provided:

> "(A) A valid mortgage which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upward, shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of Subsection M, if—"

then follow various conditions with respect to endorsement, recording, filing of affidavit, etc., compliance

with which is essential for the attaining of the status of a preferred mortgage.

Subsection E of the Ship Mortgage Act (41 Stat. 1001, 46 U. S. C. Sec. 923) further requires the procuring of certified copies of the preferred mortgage following recording and the retention of one such copy on board the mortgaged vessel for purposes of exhibition to any person having business with the vessel which may give rise to a maritime lien.

Each libel alleges a complete and strict compliance with all the provisions of the Ship Mortgage Act requisite to give to the respective mortgages the preferred status accorded by the statute. Each answer specifically *admits* that every allegation of the libel is true.

That, upon compliance with all the conditions specified, the mortgage is made preferred, is the enunciated doctrine of this Court in the only cause involving the Ship Mortgage Act which has come before it.

Morse Dry Dock & Repair Company v. Steamship The Northern Star, 271 U. S. 552, 556.

In that case the constitutionality of the Ship Mortgage Act appears to have been assumed, although seemingly not directly presented for decision.

However, several decisions of the District Courts have considered at length and have sustained the constitutionality of the Act as well as the power of Congress to enlarge the jurisdiction of the District Court sitting in admiralty.

The Oconee, 280 F. 927 (E. D. Virginia);
The Nanking, 292 F. 642 (N. D. Cal.);
The Lincoln Land, 295 F. 358 (D. Mass.).

Other decisions of Federal Courts have plainly assumed the validity of the Ship Mortgage Act and of preferred mortgages complying therewith.

The Egeria, 294 F. 791 (C. C. A. 9);
The Northern Star, 7 F. (2d) 505 (C. C. A. 2);
National Bank v. Enterprise Marine Dock Co., 43 F. (2d) 547, (C. C. A. 4);
Consumer's Co. v. Goodrich Transit Co., 53 F. (2d) 972 (C. C. A. 7); cert. denied 286 U. S. 548;
The Owego, 292 F. 403 (E. D. La.);
The Northern, No. 41, 297 F. 343 (S. D. Florida);
The Moshulu, 298 F. 348 (N. D. Cal.);
The Henry W. Breyer, 17 F. (2d) 423 (D. Maryland);
The Red Lion, 22 F. (2d) 329 (E. D. N. Y.).

Petitioner contends where it is conceded that the mortgage was valid and where all the statutory requirements requisite to accord such mortgage preferred status were complied with that such preferred mortgage, by virtue of the statutory provision, constitutes a preferred mortgage lien upon the mortgaged vessel. Petitioner also contends that upon default occurring in the terms or conditions of a preferred mortgage, such lien is enforceable by the mortgagee by suit *in rem* in admiralty, of which suit exclusive original jurisdiction is granted to the District Courts of the United States by virtue of Subsection K of the Ship Mortgage Act (41 Stat. 1003, 46 U. S. C. Sec. 951).

Exclusive original jurisdiction having been conferred upon the District Courts for the enforcement

of a lien created by the Ship Mortgage Act upon vessels of the United States over which Congress has undeniable power, petitioner contends that such jurisdiction is absolute and positive in every case where such preferred mortgage lien is existent by reason of compliance with the conditions of the Ship Mortgage Act.

The majority decision of the Circuit Court of Appeals is based upon the erroneous proposition that, although the mortgages were admittedly valid as preferred mortgages within the purview of the Ship Mortgage Act, the statutory grant of jurisdiction over the enforcement of the lien thereby created failed once it appeared that the mortgagee had advance knowledge that the mortgagor intended to, and did, use a substantial portion of the proceeds of the borrowings for non-maritime purposes.

The majority opinion said:

> "It is not enough to say that they were mortgages with due formalities placed upon the vesvels. As soon as it appeared at the trial, and it did so beyond question, that the loan was not made to be used for purposes of navigation or relating to things maritime, the court should have declined jurisdiction" (R. 329).

The majority opinion ignores the fact that the mortgages were each made after proper corporate action authorizing their execution under resolutions asserting that it was necessary to borrow the moneys "for the use and benefit" of the respective vessels (R. 253, 258). Similarly, the majority opinion overlooks completely the covenants of the mortgagor contained in

the respective mortgages that the mortgagor shall comply with and satisfy all the provisions of the Ship Mortgage Act and "shall establish and maintain this mortgage as a first preferred mortgage under said Act" (R. 35, 88). Further while admitting that the Ship Mortgage Act does not say anything about how the proceeds of the loan secured by the mortgage are to be used, the majority opinion of the Circuit Court of Appeals flatly holds that a maritime use was contemplated. Hence, the majority opinion, through reliance upon facts *aliunde* the instruments themselves relating to how the moneys thus secured were to be spent, determined that the District Court is without jurisdiction in the present suits and that the petitioner must be relegated to its remedy at common law.

Reasons for Allowance of Writ.

1. The questions presented are of considerable public importance which have not been, but should be, settled by this Court, involving fundamental questions of jurisdiction in admiralty. Indeed, the questions actually go deeper, in that while the Circuit Court of Appeals placed its decision on a basis of statutory construction, the underlying question is a constitutional one. If the statute includes within its terms the preferred mortgages in suit, as petitioner contends it clearly does, then it must be determined whether the Constitution, Article III, Section 2, permits such expansion of the field of admiralty. The constitutional problem was recognized and argued by counsel for the parties and is squarely dealt with by the dissenting opinion.

If Congress had the power under Article III, Section 2 of the Constitution to amend the general maritime

law as expressed in the Ship Mortgage Act, Subsection K of the same Act, extending the jurisdiction of the District Court, is equally valid. If, by strict compliance with the Act, each mortgage in suit became a preferred mortgage under the Act, the jurisdiction of the District Court over an action to foreclose automatically follows. It, therefore, results that the jurisdiction of the District Court over an action *in rem* to foreclose can only be defeated by destroying the preferred character of the mortgage.

The strained and illiberal construction of the statute by the majority opinion of the Circuit Court of Appeals is the result of an attempt to avoid the onus of declaring the statute in violation of the Constitution. The decision in these cases is of great interest and importance to all persons interested in our national shipping and its financing. The fostering of a merchant marine has been the fixed policy of our government for many years.

2. Throughout the country there are numberless holders of bonds secured by preferred mortgages under the Ship Mortgage Act. The decision of the majority of the Circuit Court of Appeals has opened wide the door to an attack on preferred mortgages as such and thus has impaired the value of such bonds as a security with a possibility of their complete destruction in individual cases. The pernicious effect on future efforts to float bond issues secured by preferred mortgages is certain. It follows that if this decision stands the purpose of Congress in enacting the Ship Mortgage Act will be defeated.

3. The decision in the present case is contrary both to the letter and the spirit of the Ship Mortgage Act.

It nullifies the provisions for the enforcement of the lien created by the statute by imposing upon the plain words of the statute a condition which is wholly irrelevant;—namely, to what uses did the mortgagor with the knowledge of the mortgagee put the moneys obtained upon the security of the instruments. In so determining, the Circuit Court of Appeals expressly refrained from deciding whether a loan made for maritime purposes secured by a mortgage upon a ship will become non-maritime if the borrower, contrary to the agreement of the mortgage, diverts the money to non-maritime purposes; nor would the Court express itself as to the effect, in such case, of estoppel. But the Court clearly bases its decision upon the advance knowledge of the mortgagee as to the ultimate non-maritime use of a substantial part of the borrowings by the mortgagor which depends on testimony wholly *dehors* the instrument offered for the purpose of controverting the express covenants of the mortgage. Such a construction finds no support in the letter of the Ship Mortgage Act and is contrary to the intent of Congress in the enactment of the measure for the creating of valid mortgage security on ships which would thus be made the subject of investment.

4. The Circuit Court of Appeals is in palpable error in holding that jurisdiction is to be determined by the purely subjective test of knowledge of the mortgagee of the intended use of the funds loaned.

5. The majority decision of the Circuit Court of Appeals is based upon a misapplication of the decisions of this Court in

Bogart v. The Steamboat John Jay, 17 How. 399;

Schuchardt v. Babbage, 19 How. 239;
Peoples' Ferry Co. v. Beers, 20 How. 393;
The Lottawanna, 21 Wall. 558;
The J. E. Rumbell, 148 U. S. 1.

We respectfully submit that the decision of the Circuit Court of Appeals is wrong and should be reviewed by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all the proceedings in the cases numbered on its docket numbers 175-176, October Term 1933, and entitled: "Detroit Trust Company, Trustee, Libelant-Appellee, against Steamer *Thomas Barlum,* her engines, etc., Barlum Steamship Company, Claimant-Appellant; Detroit Trust Company, Trustee, Libelant-Appellee, against Steamer *John J. Barlum,* her engines, etc., Barlum Steamship Company, Claimant-Appellant", and that the said decrees of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

DETROIT TRUST COMPANY, TRUSTEE,
Petitioner.

RAY M. STANLEY,
ELLIS H. GIDLEY,
FERRIS D. STONE,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

against

Steamer THOMAS BARLUM, her engines, etc., BARLUM STEAMSHIP COMPANY,
Respondent.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

against

Steamer JOHN J. BARLUM, her engines, etc., BARLUM STEAMSHIP COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

This is a suit within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction is invoked under Article III, Section 2 of the Constitution of the United States of America, and under Section 240 of the Judicial Code

as amended by the Act of February 13th, 1925, 43 Stat. 938 (U. S. C. A., Title 28, Section 347).

Statement.

The majority of the essential facts are stated in the petition and will not be repeated here. We call attention, however, to the fact that the testimony upon which the majority opinion of the Circuit Court of Appeals was based was all admitted over the objection and exception of libelant (R. 133-134). This testimony in substance merely amounts to this—that the mortgagor loaned a substantial portion of the proceeds of each mortgage to third parties *(i. e.,* the President of the mortgagor and to corporations controlled by him). These borrowers in turn used the moneys for non-maritime purposes. The borrowers were charged on the books of the mortgagor with the amount of the loans (R. 194, 207), obviously with the expectation that the loans would be repaid in due course.

Specifications of Error.

The Circuit Court of Appeals erred in the following:

1. In holding that it was the intention of Congress in enacting Subsection K of the Ship Mortgage Act to withhold jurisdiction of an action *in rem* brought to foreclose a preferred mortgage in all cases where the mortgagor and mortgagee knew in advance that a substantial part of the proceeds was to be devoted to a non-maritime use.

2. In holding that the jurisdiction of a District Court over an action *in rem* brought under Subsection

K of the Ship Mortgage Act may be defeated without destroying the status of a mortgage as a preferred mortgage under the Ship Mortgage Act.

3. In holding that strict compliance with all the express provisions of the Ship Mortgage Act does not of itself vest jurisdiction in the District Court over an action *in rem* to foreclose the mortgage, but that jurisdiction may be defeated by testimony *aliunde* that the loan was not made to be used for purposes of navigation or relating to things maritime.

4. In reversing the decrees of the District Court directing foreclosure and sale of the mortgaged vessels as prayed for in the libels.

POINT I.

The Ship Mortgage Act contains no express or implied condition that the proceeds of a preferred mortgage shall be devoted to maritime uses. Therefore, an intention to use the proceeds of such a mortgage for non-maritime purposes cannot affect the status of the mortgage, or the jurisdiction of the District Court to enforce it.

The language of the Ship Mortgage Act is precise, definite and certain. By Subsection D (41 Stat. 1000; 46 U. S. C. Sec. 922) it provides:

> "(a) A valid mortgage which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upward, shall in addition have, in respect to such vessel and as of the date of the compliance with all the provi-

sions of this subdivision, the preferred status given by the provisions of subsection M, if—

(1) The mortgage is indorsed upon the vessel's documents in accordance with the provisions of this chapter;

(2) The mortgage is recorded as provided in Subsection C, together with the time and date when the mortgage is so indorsed;

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States.

(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this chapter called a 'Preferred Mortgage' as to such vessel.

(c) There shall be indorsed upon the documents of a vessel covered by a preferred mortgage—

(1) The names of the mortgagor and mortgagee;

(2) The time and date the indorsement is made;

(3) The amount and date of maturity of the mortgage; and

(4) Any amount required to be indorsed by the provisions of subdivision (e) or (f) of this subsection.

> (d) Such indorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. * * *."

It is to be observed that the statute has enumerated in complete and precise detail, every step to be taken in order that the mortgage may attain the preferred status created by the Act. Strict compliance with every requirement of the Act is, therefore, necessary.

The mortgage having attained a preferred status, through strict compliance with the Act, Subsection K (41 Stat. 1003; 46 U. S. C. Sec. 951) provides that:

> "A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel."

Subsection M (41 Stat. 1004, 46 U. S. C. Sec. 953) provides that upon a sale of any mortgaged vessel by order of a District Court in any suit *in rem* in admiralty for the enforcement of a preferred mortgage lien thereon:

> "(b) * * * the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens; and (2) expenses and fees allowed and costs taxed, by the Court."

The libels in these cases allege a full and complete compliance with every provision of the Ship Mortgage Act necessary to make the mortgages in suit preferred mortgages under the Act. The answers interposed *admit* that every act and thing necessary to be done was done to make these mortgages preferred mortgages under the Act, and further expressly *admit* that the mortgages are preferred mortgages under the Act.

The majority opinion of the Circuit Court of Appeals in these cases has, for the first time, grafted on to the Ship Mortgage Act, a further condition not warranted by the language of the Act, and which would seem to be negatived by the express terms of the Act. This condition imposed by the court below, in effect, is that no matter how strict the compliance with the express provisions of the Act, if the intention existed, known to both mortgagor and mortgagee, to devote a substantial portion of the proceeds to non-maritime uses, the preferred status is not attained, at least insofar as jurisdiction of the District Court is concerned. This construction is certainly anomalous for the reason that it makes jurisdiction of a District Court in an action brought to foreclose a mortgage depend upon advance knowledge of a fact rather than upon the fact itself.

That Congress did not intend to impose any implied limitations on the use of the proceeds is fairly evidenced by the express provisions of paragraph (e) of Subsection D of the Act (41 Stat. 1000; 46 U. S. C. Sec. 922, par. (e) which provides:

> "(e) A mortgage which includes property other than a vessel shall not be held a preferred mort-

> gage unless the mortgage provides for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness. If a preferred mortgage so provides for the separate discharge, the amount of the portion of such payment shall be indorsed upon the documents of the vessel."

By this section Congress has expressly provided for a single mortgage covering ships together with any other conceivable form of property, and provides that the only requirement necessary to be observed for the maintenance of the mortgage as a preferred mortgage on the vessel shall be a provision contained in the mortgage providing for a separate discharge of such other property by the payment of a specified portion of the mortgage indebtedness and by the endorsement on the ship's papers of the amount so required to be paid.

It is obvious that Congress contemplated no allocation of the proceeds of such a mortgage to specific uses. If such had been the intention of Congress, unquestionably express provision therefor would have been incorporated in the statute.

The conclusion of the majority of the Circuit Court of Appeals, therefore, is not based upon the language of the statute, but is based upon the assumption that Congress is without power to create a preferred mortgage lien over which the District Court, sitting in admiralty, would have jurisdiction unless the mortgage lien so created was made expressly "for navigation or shipping purposes within the statute." Such a construction conflicts with the intention of Congress as

expressed in paragraph (e) of Subsection D of the Act (41 Stat. 1000; 46 U. S. C. Sec. 922, par. (e)); and no other provision of the Ship Mortgage Act lends support to the conclusion reached.

The majority opinion of the Circuit Court of Appeals defeats jurisdiction of the District Court upon the single ground that the mortgagor and mortgagee had knowledge at the time the mortgages were executed that a substantial part of the proceeds were to be devoted to non-maritime uses and assumes the constitutionality of the Act upon the ground that:

> "It was not the intention of Congress, by the mere grant of jurisdiction under the terms of the Ship Mortgage Act, to confer jurisdiction on the federal court to foreclose a mortgage lien placed on the vessel which was not made a maritime lien for navigation or shipping purposes within the statute. In granting such jurisdiction, Congress could have intended only a valid preferred mortgage thus authorized to be made under the terms of the Ship Mortgage Act. It must be a transaction which relates to navigation and things maritime" (R. 329).

Assuming this to be the intention of Congress, the Circuit Court of Appeals has thus made a practical construction of the Act, and so construing it, has held that jurisdiction of the District Court in the instant causes fails because of the use of a substantial part of the proceeds of the mortgages for non-maritime purposes. Continuing, the Court holds that the intention of Congress being plain, a mortgage executed and delivered under the precise circumstances here dis-

closed cannot attain such a preferred status as to give a District Court jurisdiction over an action *in rem* for its enforcement, and that the only way in which a mortgage executed and delivered under the precise circumstances here disclosed can attain such a status will be by an act of Congress making the necessary extension of the Ship Mortgage Act. This is evidenced by the following language employed by the majority decision below:

> "In the absence of an express provision, The Ship Mortgage Act will not be construed to extend to such a case" (R. 328).

Thus the Court affirms the constitutionality of the Ship Mortgage Act based upon an assumed intention of Congress which finds no support in the Act itself and at the same time defeats the jurisdiction of the District Court to enforce the mortgages in suit. It is to be observed that such defeat of jurisdiction is based solely upon the mere existence of knowledge that some part of the moneys were to be diverted to non-maritime uses. That jurisdiction of the District Court, sitting in admiralty, cannot be defeated except by the destruction of the preferred status of the mortgages we will discuss in a later point.

The motive and intention of Congress in enacting the legislation in question is not only clearly evidenced in the *Senate* Reports, Volume I, 66th Congress 2nd Session, but is also expressly set forth in Section I of the Merchant Marine Act of 1920 (Act of June 5, 1920, Ch. 250, Sec. 1; 41 Stat. 988; 46 U. S. C. Sec. 861) of which the Ship Mortgage Act is a part. From the Senate Reports and the recital in Section I of the Act,

it appears that the purpose of the Act was to stimulate the building of ships and the investment of capital therein. The broad purpose of Congress cannot be better expressed than by quoting the language contained in the dissenting opinion of Judge Hand in which he said:

> "It may well be that the building of ships and the investment of capital therein can best be promoted by allowing vessels to be hypothecated as readily and with the same effect as other personal property. If ship mortgages are accorded such a status, there is ground for supposing that they can be employed more advantageously than heretofore" (R. 332).

The narrow and illogical construction placed upon the Ship Mortgage Act by the majority of the Circuit Court of Appeals will have the inevitable effect of largely impairing, if not completely defeating, the purpose of Congress in enacting the legislation. Purchasers of bonds secured by preferred mortgages will no longer be able to rest secure upon the assurance, which should follow from a strict compliance with the express provisions of the Ship Mortgage Act. For strict compliance will afford no assurance, since under the decision of the majority of the Court below, that assurance may be completely destroyed if the mortgagor testifies and the Court finds as a fact that the mortgagee (merely a Trustee for innocent bondholders) knew when the mortgage was given that a substantial part of the proceeds were to be devoted to non-maritime uses. It is obvious that the public will not purchase this type of security under such circumstances.

POINT II.

The Ship Mortgage Act is a valid exercise of the power granted to Congress under Article III, Section 2 of the Constitution.

Article III, Section 2 of the Constitution of the United States extends the judicial power to "all Cases of admiralty and maritime Jurisdiction."

Article I, Section 8 confers upon Congress power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof."

In the case of *Panama Railroad Company v. Johnson*, 264 U. S. 375, in speaking of the constitutional grant contained in Article III, Section 2, this Court said at page 386:

> "Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this Court, gave effect to it. Practically, therefore, the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded, or as being only the law of the several states, but as having become the law of the United States,—subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require."

In the case of *The Lottawanna,* 21 Wall. 558, this Court said at page 577:

> "It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable."

In the case of *Southern Pacific Company v. Jensen,* 244 U. S. 205, this Court said at page 215:

> "Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

Citations might be multiplied which establish that it is now beyond dispute that Congress has power in its discretion, and as required by experience or changing conditions, to alter, qualify or supplement the maritime law by statutes of general application embodying its deliberate judgment. Only thus may be safeguarded the characteristic of harmony and uniformity conferred by the constitutional grant. Through the exercise of such power is made possible the continued adherence by Congress to its fixed and time honored policy of encouragement and protection of investment in ships and the consequent maintenance and strengthening of our national merchant marine. It follows that Congress has power to create and confer preferred status upon a mortgage covering a vessel of the United States without regard to the uses which may be made of the proceeds of such mortgage.

The constitutionality of the Ship Mortgage Act was first attacked in the case of *The Oconee,* 280 Fed. 927.

It was there urged that it was beyond the power of Congress to give a preferred status to a ship mortgage upon the ground that a ship mortgage was a non-maritime contract, and that it was not within the power of Congress to create a preferred maritime lien out of a contract essentially non-maritime in character, citing as a basis for the claim the cases of:

The John Jay, 17 How. 399;
Peoples Ferry Co. v. Beers, 20 How. 393;
The J. E. Rumbell, 148 U. S. 1;
The Lottawanna, 21 Wall. 558, among others.

Both upon reason as well as upon the authority of the very cases cited, District Judge Groner, sitting in the Eastern District of Virginia, upheld the constitutionality of the Act.

The constitutionality of the Ship Mortgage Act was again attacked in the case of *The Nanking,* 292 Fed. 642, where the same considerations were urged as were urged in the case of *The Oconee, supra.* Judge Partridge, sitting in the Northern District of California, again upheld the constitutionality of the Act.

The constitutionality of the Act was again attacked, as well as the power of Congress to enlarge the admiralty jurisdiction of the District Court, in the case of *The Lincoln Land,* 295 Fed. 358. In this case Judge Brewster, sitting in the District Court of Massachusetts, again upheld the constitutionality of the Act, as well as the power of Congress to enlarge jurisdiction of the District Court, sitting in admiralty.

In the case of *Morse Dry Dock & Repair Co. v. Steamship Northern Star,* 271 U. S. 552, the constitu-

tionality of the Act was assumed by this Court, inasmuch as the question of constitutionality of the Ship Mortgage Act was apparently not raised.

This Court has, therefore, never interpreted the Ship Mortgage Act as a whole, nor considered the power of Congress to enact it.

The power of Congress to make substantive changes in the law maritime has been repeatedly exercised. The jurisdiction of the District Court, sitting in admiralty, by the Judiciary Act of 1789 (Act Sept. 24, 1789, Sec. 9, 1 Stat. 76) was made to include cases of seizure under the impost, navigation and trade laws. The original act providing for limitation of liability, enacted March 3, 1851 (Ch. 43, 9 Stat. 635, 636) made a radical change in the substantive law and the jurisdiction of a court of admiralty to enforce the provisions of the Act automatically followed. The Act of June 23, 1910 (Ch. 373, 36 Stat. 604) creating a maritime lien for supplies furnished in a home port of a vessel where no lien had theretofore existed under the general maritime law, automatically conferred jurisdiction on the District Courts to enforce such liens. Indeed, before Congress enacted the statute in question this Court held (Perry v. Haines, 191 U. S. 17) that where a State statute gave a maritime lien for supplies furnished in a home port of a vessel the District Courts of the United States had exclusive jurisdiction to enforce that lien by proceedings *in rem*—this to the exclusion of State statutes providing a remedy *in rem*.

By the Act of June 26, 1884 (Ch. 121, Sec. 18; 23 Stat. 57, 46 U. S. C. 189) Congress radically extended

the martime law by an addition to the Limited Liability Act by which the individual liability of a ship owner was limited to the proportion of any and all debts and liabilities his individual share of the vessel bore to the whole; and in *Richardson v. Harmon,* 222 U. S. 96, this Court held that the provisions of the Act in question extended to and included non-maritime torts, and that the owner of a vessel could proceed in admiralty for a limitation of his liability for the destruction of a bridge concededly a land structure. There was no express act of Congress extending the jurisdiction of the admiralty courts to non-maritime torts. Jurisdiction followed as a result of the enactment of the Act.

The instances cited sufficiently illustrate the power of Congress to extend the maritime law to matters essentially non-maritime in character. Indeed, the power of Congress so to do was expressly recognized in a dictum of the United States Supreme Court in the case of *The John Jay,* 17 How. 399, where it is suggested that Congress would have the power to extend the maritime law to cover a ship mortgage in the following language:

> "It is true that the policy of commerce and its exigencies in England have given to its Admiralty Courts a more ample jurisdiction in respect to mortgages of ships, than they had under its former rule, as that has been given in this opinion. But this enlarged cognizance of mortgages of ships has been given there by Statute 3 and 4, Vic., ch. 65. Until that shall be done in the United States, by Congress, the rule in this particular must continue in the Admiralty Courts of the United States, as it has been."

That Congress has complete power to control and regulate vessels of the United States was expressly recognized by this Court in the case of *White's Bank v. Smith*, 7 Wall. 646, where the Court said:

> "Some question is made as to the power of Congress over the title and property of vessels of the United States to such an extent as to enable it to pass a recording Act.
>
> But, after the regulation of this species of property by the several Acts of Congress to which we have referred, and in respect to which there has never been a question, there can be very little hesitation in conceding the power to protect the rights of subsequent *bona fide* purchasers and mortgagees therein.
>
> Ships or vessels of the United States are the creations of the legislation of Congress. * * *"

If Congress intended in the enactment of the Ship Mortgage Act that the application of the proceeds of a mortgage should be limited to maritime uses, it has defeated the primary purpose of the Act. If Congress intended to create a preferred mortgage lien without placing any limitation, express or implied, upon the application of the proceeds, it had undoubted power based upon both reason and authority so to do and the purpose of the statute is fully served.

POINT III.

If the mortgages in suit are preferred mortgages under the Act, the jurisdiction of the District Court over an action in rem to enforce them necessarily follows.

In the preceding point we have noted that in cases where Congress has extended the maritime law to

subjects over which the courts of admiralty had never theretofore exercised jurisdiction that jurisdiction automatically followed without any express enactment of Congress. Here, however, Congress, exercising superabundant caution, by the express provisions of Subsection K (41 Stat. 1003; 46 U. S. C. Sec. 951) has expressly vested jurisdiction in the District Courts in the following language:

> "Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit *in rem* in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively."

If Congress has the power to make a ship mortgage, which prior to the enactment of the statute was concededly a non-maritime contract, a preferred mortgage lien, maritime in character, having priority over various other types of maritime liens, it likewise had authority to vest jurisdiction in the District Court, sitting in admiralty, to enforce that lien.

That Congress possesses adequate power to create a lien effective against vessels of the United States may not be questioned. Such instruments of commerce engaged in water transportation and navigation are always subject to the regulation and control of Congress. *White's Bank v. Smith, supra.* The creation of a preferred mortgage lien upon vessels of the United States is but a further employment of the power of Congress to regulate and control such instrumentalities of transportation and commerce.

The lien so created consists of an appropriation of the personified *res* as security for the indebtedness represented by the mortgage. Such has ever been the characteristic foundation of the *rem* action in the admiralty. Once created, the lien is exclusively enforceable against the personified *res* in a court of admiralty, and not elsewhere.

Such jurisdiction may only be defeated by the destruction of the preferred status of the mortgages. But preferred status attained through compliance with the conditions of the statute may not be here destroyed. Reference to the respective mortgages which are attached to and expressly made a part of the libels (R. 10, 63) shows that the mortgagor solemnly covenanted and engaged that all requisite corporate action on its part for the execution and delivery of the bonds and of the respective mortgages had been taken (R. 29, 82); that the mortgagor would, in all respects, comply with the provisions of the Ship Mortgage Act so as to create and maintain the respective mortgages as preferred mortgages within the provisions of the Act, and would perform such acts as requested by the Trustee, as reasonably calculated to preserve the preferred status of the mortgages until fully paid and performed (R. 32, 85). Moreover, Article XIII of the respective mortgages provides:

> "Preferred Mortgage.
>
> That the mortgagor shall comply with and satisfy all the provisions of the 'Ship Mortgage Act, 1920' and shall establish and maintain this mortgage as a first preferred mortgage under said Act" (R. 35, 88).

In the face of these covenants contained in the mortgages, the preferred status of the mortgages in suit cannot be destroyed and the jurisdiction of the District Court over actions *in rem* to enforce such preferred mortgages necessarily follows.

POINT IV.

Estoppel bars the defense and renders the testimony on which the majority opinion rests wholly incompetent.

If effect be given to the admissions contained in the answers and to the binding character of the affirmative covenants contained in the mortgages, the mortgagor was estopped from offering the testimony in question, either for the purpose of attacking the validity of the mortgages or defeating the jurisdiction of the Court. Notwithstanding the opinion of the majority of the Court below is based on this wholly incompetent testimony.

CONCLUSION.

We respectfully submit that a writ of certiorari should be granted to review the decisions of the United States Circuit Court of Appeals for the Second Circuit in these causes because of the importance of the questions presented which ought to be settled by this Court; because the decision in the present cases destroys the benefits provided by the Ship Mortgage Act in cases where strict compliance was had with the provisions of the Act conferring a preferred mortgage status; and because the decision in the present cases is contrary to both the letter and spirit of the Ship Mortgage Act.

Dated: March 20, 1934.

Respectfully submitted,

RAY M. STANLEY,
ELLIS H. GIDLEY,
FERRIS D. STONE,
CLEVELAND THURBER,
Counsel for Petitioner.

FILE COPY

FILED
SEP 6 19
CHARLES ELMORE CR
OLE

Supreme Court of the United States

October Term, 1934.

No. 13.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

against

Steamer "THOMAS BARLUM", her engines, etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

No. 14.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

against

Steamer "JOHN J. BARLUM", her engines, etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

BRIEF FOR PETITIONER.

RAY M. STANLEY,
ELLIS H. GIDLEY,
FERRIS D. STONE,
CLEVELAND THURBER,
Counsel for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

SUBJECT INDEX.

	Page
Opinions Below	1
Statement as to Jurisdiction	2
Statement of Case	2
'Thomas Barlum' mortgage (No. 13)	3
'John J. Barlum' mortgage (No. 14)	4
Nature of Suits	6
Decision of Circuit Court of Appeals	10
Issues Involved	11
Specifications of Error	12
POINT I—The provisions of the Ship Mortgage Act are valid and constitutional within the power of Congress implied under Article III, Section 2 of the Constitution to alter, qualify or supplement our national system of maritime law as experience or changing conditions may require	14
POINT II—If the power of Congress has been validly exercised and the mortgages in suit are preferred mortgage liens under the Act, the jurisdiction of the District Court over an action in rem to enforce them necessarily follows	33
POINT III—The construction given to the Ship Mortgage Act by the majority of the Court below largely impairs, if not completely defeats, the purpose of Congress in enacting the Statute	38
Conclusion	43
Appendix—Text of Ship Mortgage Act, 1920	44

TABLE OF CASES CITED.

Belfast, The, 7 Wall. 624	22, 34
Blackheath, The, 195 U. S. 361	34
Bogart v. John Jay, The, 17 How. 399	28, 32, 33
Breyer, Henry W., The, 17 Fed. (2d) 423 (D. Maryland)	29
Burnett v. Coronado Oil & Gas Co., 285 U. S. 393	27
Butler v. Boston & Savannah S. S. Co., 130 U. S. 527	34
Conger, Omar D., The, 1 Fed. (2d) 732 (E. D. Mich.)	37
Consumer's Co. v. Goodrich Transit Co., 53 Fed. (2d) 972, (C. C. A. 7) Cert. denied 286 U. S. 548	29
Crowell v. Benson, 285 U. S. 22	24, 26, 27, 34
Egeria, The, 294 Fed. 791 (C. C. A. 9)	29
Fairport P. & E. R. Co. v. Meredith, ...U. S. ..... (decided June 4, 1934)	17
Funk v. United States, 290 U. S. 371	27
Genesee Chief, The, 12 How. 443	27, 34
Insurance Co. v. Dunham, 78 U. S. 1	34, 35
Kaisha v. Pacific Export Lumber Co., 260 U. S. 490	35

Page
Lincoln Land, The, 295 Fed. 358 (D. Mass.) 28, 29
Lindgren v. United States, 281 U. S. 38 26
Lottawanna, The, 21 Wall. 558 ..... 22, 23, 34
Main, The v. Williams, 152 U. S. 122 24
Margaret, The, 9 Wheat. 421 24
Morse Dry Dock & Repair Co. v. Steamer Northern Star, 271 U. S. 552 30
Moshulu, The, 298 Fed. 348 (N. D. Cal.) 29
Nanking, The, 292 Fed. 642 (N. D. Cal.) 28, 29, 33
National Bank v. Enterprise Marine Dock Co., 43 Fed. (2d) 547, (C. C. A. 4) 29
New Jersey Steam Nav. Co., The, v. Merchant's Bank, The, 6 How. 344 24
Northern No. 41, The, 297 Fed. 343 (S. D. Florida) 29
Northern Star, The, 7 Fed. (2d) 505 (C. C. A. 2) 29
Oconee, The, 280 Fed. 927 (E. D. Virginia) 28, 29, 30
Owego, The, 292 Fed. 403 (E. D. La.) 29
Panama R. R. Co., v. Johnson, 264 U. S. 375 ..... 22, 23, 32, 34
Peoples Ferry Co. v. Beers, 20 How. 393 21
Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1 25
Red Lion, The, 22 Fed. (2d) 329 (E. D. N. Y.) 29
Richardson v. Harmon, 222 U. S. 96 ..... 25, 36
St. Lawrence, The, 1 Black 522 34
Saturnus, The, 250 Fed. 407 35
Southern Pacific Co. v. Jensen, 244 U. S. 205 23
Thomas Jefferson, The, 10 Wheat. 428 27
Tucker v. Alexandroff, 183 U. S. 424 30
United States v. Flores, 289 U. S. 137 ..... 24, 30, 36
Waring v. Clarke, 5 How. 441 ..... 22, 24
West Point, The, 271 Fed. 502 (D. Mass.) 37

AUTHORITIES CITED.

Act of Sept. 24, 1789, (Ch. 20, Sec. 9, 1 Stat. 76) 24
Act of March 3, 1851, (Ch. 43, 9 Stat. 635, 636) 24
Act of June 26, 1884, (Ch. 121, Sec. 18; 23 Stat. 57, 46 U. S. C. 189) 25
Act of June 23, 1910, (Ch. 373, 36 Stat. 604) 25
Act of March 4, 1915, (Ch. 153, Sec. 20, 38 Stat. 1185) 26
Act of June 6, 1924, (Ch. 273, Sec. 1, 43 Stat. 467) 18
Act of March 4, 1927, (Ch. 509, Sec. 1, 44 Stat. 1424) 26
Act of March 4, 1927, (Ch. 512, Sec. 1, 44 Stat. 1451) 18
Act of May 22, 1928, (Ch. 675, Sec. 301(a), 45 Stat. 690) 18
Act of Feb. 2, 1931, (Ch. 100, 46 Stat. 1059) 18
Article I, Section 8 of the Constitution of the United States 22, 33
Article III, Section 2 of the Constitution of the United States 2, 7, 12, 14, 17, 21, 22, 28, 34, 36

Page

Judicial Code, Section 24, Amended, 28 U. S. C. 41, Subdivision 3 34

Judicial Code, Section 240, as amended by Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 347) 2

Longshoremen's and Harbor Workers' Compensation Act (Act March 4, 1927, Ch. 509, Sec. 1, 44 Stat. 1424, 33 U. S. C. Ch. 18) 26

Merchant Marine Act, 1920 (Act June 5, 1920, Ch. 250) 18, 26

Section 1, (41 Stat. 988, 46 U. S. C. 861) 18

Section 11, (41 Stat. 993; amended by Act June 6, 1924, Ch. 273, Sec. 1, 43 Stat. 467, 46 U. S. C. 870) ..18, 20, 40, 42

Section 30, (41 Stat. 1000-1006, 46 U. S. C. Ch. 25) 18, 44

Senate Reports, Vol. I, 66th Congress 2nd Session 19

Ship Mortgage Act, (Act June 5, 1920, Ch. 250, Sec. 30, 41 Stat. 1000-1006; 46 U. S. C. Ch. 25) 2, 3, 6, 7, 10, 14, 21, 28, 33, 37, 38, 40, 42, 44

(Printed in full in appendix) 44

Subsection D (41 Stat. 1000, 46 U. S. C. 922) 20, 21, 38, 40, 45

Subsection K (41 Stat. 1003, 46 U. S. C. 951) 4, 5, 12, 15, 37, 38, 51

Subsection M (41 Stat. 1004, 46 U. S. C. 953) 39, 52

Subsection P (41 Stat. 1005, 46 U. S. C. 971) 26, 54

Section 41, Subdivision 3, 28 U. S. C. Judicial Code Section 24, Amended 34

IN THE

Supreme Court of the United States

October Term, 1934.

Nos. 13-14.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

against

Steamer "THOMAS BARLUM", her engines, etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

against

Steamer "JOHN J. BARLUM", her engines, etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

BRIEF FOR PETITIONER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Official Reports of the Opinions Below.

Both the prevailing and dissenting opinions of the Circuit Court of Appeals (R. 215-220, 221-227) are reported at 68 Fed. (2d) 946.

The original opinion of the District Court upon exceptions (R. 75-76) is reported at 56 Fed. (2d) 455; and the subsequent opinion of the District Court following trial of the causes (R. 180-182) is reported at 2 Fed. Supp. 733.

Statement of the Grounds on Which the Jurisdiction of the Court is Invoked.

(1) The decrees to be reviewed are those of the Circuit Court of Appeals, dated February 13, 1934 (R. 227-229).

Petitions for rehearing were subsequently denied by order of the Circuit Court of Appeals dated March 13th, 1934 (R. 229-230).

The petition for certiorari was filed March 30th, 1934, and the writ was granted April 30th, 1934.

(2) Jurisdiction is conferred upon this Court by Section 240 of the Judicial Code (as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. 347), and under Article III, Section 2, Clause 1 of the Constitution of the United States of America.

Statement of the Case.

Your petitioner, Detroit Trust Company, Trustee, is the mortgagee named in each of two preferred marine mortgages covering the Steamers THOMAS BARLUM and JOHN J. BARLUM, respectively, given pursuant to the Ship Mortgage Act 1920 (Act

June 5, 1920, Chap. 250, Sec. 30; 41 Stat. 1000-1006; 46 U. S. C., Chap. 25).

Both the Steamer THOMAS BARLUM and the Steamer JOHN J. BARLUM are vessels of the United States, of several thousand tons burden, and licensed for the coasting trade upon the Great Lakes. At the time of the making of the mortgages in suit, these vessels were owned by Barlum Steamship Company, a West Virginia corporation, having its principal office in the City of Detroit, Michigan. John J. Barlum was the principal and controlling owner of stock in the mortgagor corporation (R. 132, 133-135; R. 170, Ex. 22). He was president and Thomas Barlum was secretary of the corporation (R. 32, 67).

Thomas Barlum Mortgage (No. 13).

In February, 1929, John J. Barlum negotiated an agreement with petitioner for the purchase by petitioner of an issue of bonds to be made by Barlum Steamship Company aggregating the sum of $200,000.00, secured by a first preferred mortgage on the Steamer THOMAS BARLUM (R. 156, Ex. 7). These bonds were purchased by petitioner for sale to the general public and were largely so sold (R. 102-104, 106).

The undisputed testimony shows that the net proceeds of this bond issue, aggregating $194,800.00, were disbursed by petitioner in exact conformity with the written directions supplied by the mortgagor (R. 159, Ex. 8-A) as follows:

$50,358.33 for the refunding of the unpaid balance of a prior existing issue of notes secured by a prior existing preferred mortgage,

also executed and delivered under the provisions of the Ship Mortgage Act.

$45,510.00 for the payment of a note of Thomas Barlum & Sons Company (a corporation controlled by John J. Barlum, President of the mortgagor).

$54,490.00 for the payment of notes of John J. Barlum.

$ 1,545.23 for the payment of miscellaneous expenses in connection with the giving of the mortgage.

$42,896.44 the residue, was paid to the mortgagor (R. 158, Ex. 8) and was used by the mortgagor for the payment of accounts incurred in the operation of both vessels (R. 118, 167, Ex. 19).

According to their legal effect, these payments, other than for refunding of the prior mortgage and payment of expenses and the residue to the mortgagor, merely constituted loans made by the mortgagor out of the proceeds of the mortgage (R. 142, 131, 78) of which loans the mortgagee had knowledge prior to the making of the preferred mortgage here in question.

Default occurred February 1, 1931, whereupon petitioner invoked the jurisdiction of the District Court pursuant to Subsection K of the Ship Mortgage Act (41 Stat. 1003, 46 U. S. C. 951) for the enforcement of the lien of the mortgage.

John J. Barlum Mortgage (No. 14).

In December, 1927, similar negotiations between the parties had resulted in an agreement for the purchase by petitioner of an issue of bonds to be made by Barlum Steamship Company aggregating the like

sum of $200,000.00, secured by a first mortgage upon the Steamer JOHN J. BARLUM (R. 161, Ex. 13). These bonds were purchased by petitioner for sale to the general public and were largely so sold (R. 102-104, 106).

Of the net proceeds of the JOHN J. BARLUM mortgage, aggregating $196,733.33 there is nothing in the record to indicate that petitioner (mortgagee, trustee) had advance knowledge of the uses which the mortgagor purposed to make of the balance turned over to the mortgagor and amounting to substantially more than half such proceeds. After the mortgage was executed, delivered and recorded, petitioner (mortgagee, trustee) disbursed the moneys in exact conformity with the express directions in writing of the mortgagor (R. 162, Ex. 15) as follows:

$92,363.38 for the payment of note, bonds and coupons of John J. Barlum. After deduction of miscellaneous expenses connected with the mortgage, there was paid to the mortgagor a balance of

$102,801.55 (R. 163, Ex. 15-A).

Again, according to its legal effect, this payment, other than payment of the residue to the mortgagor, merely constituted a loan made by the mortgagor out of the proceeds of the mortgage (R. 142, 78), of which loan the mortgagee had knowledge prior to the making of the preferred mortgage here in question.

Default similarly occurred upon the John J. Barlum mortgage on December 15, 1930, and the jurisdiction of the District Court, pursuant to Subsection K of the Ship Mortgage Act, was similarly invoked for the enforcement of the lien of the mortgage.

Nature of the Suits.

Following default, libels were filed by petitioner in the United States District Court for the Western District of New York and the vessels were seized at the Port of Buffalo. The libels respectively allege the execution and delivery of the preferred mortgages to secure payment of the indebtedness evidenced by each issue of bonds.* A complete and strict compliance with the provisions of the Ship Mortgage Act is alleged. Default is pleaded and relief is sought by sale of the respective vessels and decree of foreclosure thereon (R. 7-9, 42-44).

True copies of the respective preferred mortgages were attached to the libels and were expressly made a part of the pleadings (R. 5, 40). Among the specific covenants and agreements contained in each preferred mortgage, performance of which was expressly assumed by the mortgagor under the "Assumpsit" clause, were covenants (1) that the mortgagor had authority to mortgage and that all requisite action had been effectively taken (R. 17, 51, Art. I); and (2) that the mortgagor would comply with the provisions of the "Ship Mortgage Act, 1920" so as to create, establish and maintain such mortgage as a first preferred mortgage under said Act (R. 20, 54, Art. VI; R. 22, 56, Art. XIII). These covenants are emphasized by the further covenant that the mortgagor would "do all things necessary to preserve the lien of this mortgage as a first and prior lien upon said vessel" until full payment (R. 21, 55, Art. X).

* Whether the mortgages here involved are preferred is one of the issues in these cases. However for convenience of description we refer to them henceforth as preferred mortgages.

In each of the cases Barlum Steamship Company (mortgagor) made claim to the vessel but failed to file bond for the release thereof. Barlum Steamship Company then attacked the jurisdiction of the District Court by exceptions in each case. After hearing, the exceptions were overruled by the District Court (R. 75-78). Answers to the libels were then interposed. The answers first *admit* every allegation of the libels (R. 78). Two separate affirmative defenses are therein alleged; the first of which alleges that the indebtedness of respondent to petitioner in the sum of $200,000.00, as evidenced by bonds aggregating that amount to secure payment of which the respective mortgages were given, arose out of the loan of moneys to the mortgagor in that amount, and that said moneys were *used* by the mortgagor almost entirely for non-maritime purposes, *i. e.*, for loans made by the mortgagor to others, to the knowledge of the mortgagee (petitioner) when the mortgages were executed and delivered. The second defense is the same as was urged by exceptions, *i. e.*, that the facts alleged in the libel did not constitute a cause of action within the admiralty and maritime jurisdiction of the Court; and that the Ship Mortgage Act, 1920, insofar as it purported to permit the enforcement of the lien of the mortgages by libel *in rem* in admiralty, and to grant original jurisdiction to the Court, is violative of, and in contravention of Article III, Section 2 of the Constitution of the United States (R. 78-79).

Notwithstanding that the answers admit every allegation of the libels, the mortgagor took testimony by deposition in support of the allegations contained in the separate defenses of the answers, over the express

objection and exception of petitioner concerning all examination bearing upon either separate defense contained in the answers (R. 83-84).

This testimony clearly showed that it was the established practice of the mortgagor to loan substantial portions of its funds to other Barlum interests. John J. Barlum, President of the mortgagor (respondent), testified that it was his practice to borrow money back and forth between the various corporations of which he was the head; and that all the moneys that went from Barlum Steamship Company to the other corporations were loans by the Barlum Steamship Company to those corporations (R. 141, 142). He further testified that the payments made out of the proceeds of both mortgages in suit by petitioner were made as the result of express authorization in writing by his corporation and signed by him (R. 141). Such appears from the written authorizations placed in evidence (R. 159, Ex. 8-A; R. 162, Ex. 15). Mr. Barlum's testimony as to loans made by Barlum Steamship Company out of the proceeds of the mortgages was verified by Ruth Alleman, his secretary and also bookeeper for the mortgagor, who testified that certain specific items paid by the mortgagee upon the authorization of the mortgagor were charged as debits upon the books of the mortgagor corporation against the individual and corporations receiving such payments and still remained owing and unpaid to Barlum Steamship Company (R. 131). Upon cross-examination Mr. Barlum identified the consents of stockholders to mortgage the respective steamers (R. 142, R. 171, Ex. 23; R. 174; Ex. 25) and testified to the correctness of certified copies of resolutions

adopted by the Board of Directors of Barlum Steamship Company concerning the procuring of the respective loans upon the security of preferred mortgages on said respective vessels (R. 142, R. 173, Ex. 24; R. 176, Ex. 26). These resolutions each recite in part as follows:

> "WHEREAS, it is necessary to borrow the sum of two hundred thousand dollars ($200,000.00) *for the use and benefit of the S. S. '.....'* and said amount may be obtained from the Detroit Trust Company, Trustee, *on the security of a preferred mortgage on said steamship* * * *."
>
> "BE IT FURTHER RESOLVED, that the president and secretary of this corporation be, and they hereby are, authorized and directed * * * to also make, execute and deliver to said Detroit Trust Company, Trustee, *said first preferred mortgage* in the name and under the seal of this corporation." (Italics ours.) (R. 173, 176.)

Proofs as to the defaults and the amounts due under the mortgages were taken and the issues and evidence were submitted to the District Court. A further opinion was filed by District Judge Adler upholding the right of the mortgagee (petitioner) to enforce the respective preferred mortgages in a Court of Admiralty as provided by the Ship Mortgage Act and decrees were ordered submitted (R. 180-182).

Decrees were entered in the respective suits providing for foreclosure and directing sale of the respective vessels to satisfy the amounts found to be due (R. 182, 190).

The mortgagor (respondent) then appealed to the United States Circuit Court of Appeals for the Second

Circuit which by a divided Court reversed the decrees of the District Court (R. 227-229). Petitions for rehearing were subsequently denied (R. 229, 230).

Decision of the Circuit Court of Appeals.

The prevailing opinion of the Circuit Court of Appeals (Manton and Chase, C. J.) held:

1. That the jurisdiction of the District Court over an action *in rem* to foreclose a preferred mortgage complying with all the express provisions of the Ship Mortgage Act may be defeated by showing that the mortgagor and mortgagee had advance knowledge that a substantial part of the proceeds of the mortgage was to be used for non-maritime purposes.

2. That the result follows notwithstanding the libel alleges and the answer admits that the mortgage in question is a preferred mortgage under the Act.

3. That admiralty jurisdiction over the foreclosure of preferred mortgages on vessels is limited to mortgages the proceeds of which were used "to develop and encourage the maintenance of a merchant marine."

4. That the use made of the moneys (the proceeds of these mortgages) was so non-maritime in character as to take the mortgages in suit out of the purview of the Ship Mortgage Act (R. 215-220).

The dissenting opinion of the Circuit Court of Appeals (A. N. Hand, C. J.) held:

1. That since each mortgage admittedly was a valid mortgage and since the owner (mortgagor) in all re-

spects complied with the provisions of the Ship Mortgage Act relating to preferred mortgages, each mortgage attained a preferred status.

2. That the Ship Mortgage Act was passed in aid of the development and encouragement of our merchant marine, and was intended to give to ship mortgages complying with the statute a status permitting their more advantageous employment by way of promotion of investment than had been theretofore enjoyed.

3. That to make the status of a preferred mortgage depend upon the purposes for which it is given is to engraft upon the plain words of the statute an exception seemingly contrary to its terms and not required by any convincing public policy.

4. That the whole matter is one of the creation and displacement of liens upon ships as essential marine instrumentalities over which Congress has complete control under its power to alter, qualify or supplement the maritime law.

5. That the mortgages in suit being admittedly valid as preferred mortgages, the admiralty court had jurisdiction and the decrees ordering sales of the vessels for the satisfaction of the liens of the mortgages should be affirmed (R. 221-227).

Issues Involved.

The case, therefore, presents the following questions:

1. Was it the intention of Congress in enacting Subsection K of the Ship Mortgage Act to withhold jurisdiction of an action *in rem* brought to foreclose a preferred mortgage in all cases where the mortgagor and mortgagee knew in advance that a substantial part of the proceeds was to be devoted to non-maritime uses?

2. If Congress intended to create a preferred mortgage lien in all cases where the provisions of the Ship Mortgage Act are strictly complied with, irrespective of the devotion of the proceeds to non-maritime uses, has it the power so to do under Article III, Section 2 of the Constitution?

3. Can jurisdiction of a District Court over an action *in rem* brought under Subsection K of the Ship Mortgage Act be defeated without destroying the status of a mortgage as a preferred mortgage under the Ship Mortgage Act?

Specifications of Error Intended to Be Urged.

The United States Circuit Court of Appeals for the Second Circuit erred in the following particulars:

1. In holding that it was the intention of Congress in enacting Subsection K of the Ship Mortgage Act to withhold jurisdiction of an action *in rem* brought to foreclose a preferred mortgage in all cases where the mortgagor and mortgagee knew in advance that a substantial part of the proceeds was to be devoted to non-maritime uses.

2. In holding that the jurisdiction of a District Court over an action *in rem* brought under Subsection

K of the Ship Mortgage Act may be defeated without destroying the status of a mortgage as a preferred mortgage under the Ship Mortgage Act.

3. In holding that strict compliance with all the express provisions of the Ship Mortgage Act does not of itself vest jurisdiction in the District Court over an action *in rem* to foreclose the mortgage, but that jurisdiction may be defeated by testimony *aliunde* that the loan was not made to be used for purposes of navigation or relating to things maritime.

4. In failing to hold that the Ship Mortgage Act was constitutional irrespective of the use of the proceeds of the mortgages.

5. In failing to hold that the District Court had jurisdiction to foreclose the preferred mortgages in suit irrespective of the use of the proceeds of the mortgages.

6. In misconceiving or disregarding the legal effect of the disposition by the mortgagor of the proceeds of the preferred mortgages in suit.

7. In reversing the decrees of the District Court directing foreclosure and sale of the mortgaged vessels as prayed for in the libels.

POINT I.

The provisions of the Ship Mortgage Act are valid and constitutional within the power of Congress implied under Article III, Section 2 of the Constitution to alter, qualify or supplement our national system of maritime law as experience or changing conditions may require.

The essential and undisputed facts upon which the decision of these cases must turn are as follows:

The Barlum Steamship Company, the owner of the Steamers THOMAS BARLUM and JOHN J. BARLUM, both vessels duly enrolled and licensed under the laws of the United States and engaged in commerce and navigation on the Great Lakes, their connecting and tributary waters, executed and delivered to the Detroit Trust Company, Trustee, a preferred mortgage on each ship for $200,000.00. The mortgages were drawn under the provisions of the Ship Mortgage Act (Section 30 of Chapter 250, Act of June 5, 1920, 46 U. S. C., Chapter 25) (printed in full in the appendix) and the answers interposed to the libels filed for the foreclosure of these mortgages expressly admit that every formality required by the Act to make them preferred mortgages under the Act was fully met.

At the time of the execution and delivery of the mortgages the mortgagor loaned a substantial portion of the proceeds of each mortgage to third parties. The amount of the loans was charged on the books of the mortgagor against the borrowers, who in turn devoted the amount of such loans to non-maritime uses. The mortgagee knew to the extent noted in the statement

of facts at the time the mortgages were executed and delivered and the consideration paid that the mortgagor purposed to make the loans in question.

Following default these suits *in rem* were instituted in the United States District Court for the Western District of New York for the foreclosure of the mortgages as provided by Subsection K of the Ship Mortgage Act. In these suits, as before stated, every allegation contained in the libels was expressly admitted, but affirmative defenses attacked the constitutionality of the Ship Mortgage Act and the jurisdiction of the Court, sitting in admiralty, to foreclose.

The constitutionality of the Act, as well as the jurisdiction of the District Court, was sustained. On appeal to the Circuit Court of Appeals for the Second Circuit the decrees of the District Court were reversed. The majority opinion of the Circuit Court of Appeals concedes the power of Congress to enact the Ship Mortgage Act only if the mortgage be given to secure the payment of moneys actually devoted to such maritime uses as would support a suit in admiralty either *in rem* or *in personam* if the mortgage did not exist. Judge Augustus N. Hand in his dissenting opinion so construes the majority opinion (R. 224). The majority opinion unsuccessfully attempts to confine its decision to narrower limits, attempting to base its decision upon advance knowledge of the mortgagee that these loans were to be made by the mortgagor and used in turn by the borrowers for non-maritime purposes, and not upon the fact itself that a substantial part of the proceeds was devoted to non-maritime uses.

In thus attempting to narrow the basis of its decision, the majority opinion says:

> "We need not decide whether or not a loan made for maritime purposes secured by a mortgage on a ship will become non-maritime if the borrower, contrary to the agreement of the mortgage, diverts the money to non-maritime purposes * * *." (R. 218-219.)

This was the precise question presented for decision. The agreement of each mortgage was, and is, that it should be a preferred mortgage lien under the Ship Mortgage Act. The mortgagor did make loans to borrowers, who in turn used the moneys for non-maritime purposes. Mere advance knowledge of the mortgagee that the moneys were to be so used cannot possibly defeat jurisdiction. If jurisdiction be defeated, it must be by reason of the fact itself, and not mere knowledge of the fact in the mortgagee.

The majority opinion then continues:

> "Nor need we consider what effect any estoppel in such case would have" (R. 219).

The question of estoppel was squarely presented since the mortgagor was permitted to offer, and the Court based its decision on, testimony which, by virtue of the express covenants in the mortgages, the mortgagor was estopped from urging.

The majority opinion finally holds (R. 220) that though the Ship Mortgage Act says nothing about how a loan secured by a ship mortgage is to be used, Congress intended that a maritime use should be made of the proceeds. By necessary inference, the opinion

holds that if Congress intended to place no limitation on the use of the moneys secured by the mortgage, and intended and provided that the preferred status of the mortgage, once attained, continued irrespective of the use made of the moneys, Congress exceeded its power under Article III, Section 2 of the Constitution; and that in the absence of such an express provision in the Act itself the statute would not be so construed.

That we have correctly stated the plain import of the majority opinion is made manifest by the dissenting opinion by Judge Augustus N. Hand (R. 221-227).

The construction placed upon the Ship Mortgage Act by the court below finds no support in any canon of construction. The intention of Congress must be evidenced by the terms of the Act itself, unless the language chosen is so ambiguous as to make recourse to Congressional debates necessary.

> Fairport P. & E. R. Co., v. Meredith, ... U. S. ...., (decided June 4, 1934) and cases there cited.

The language of the Act is so clear and explicit that no such reference is necessary. The statute prescribes in detail and separately states a series of requirements necessary to be performed in order to create a preferred mortgage under the statute. These things being done, the statute decrees that the mortgage shall constitute a preferred mortgage lien superior to all other maritime liens against the ship, except those enumerated in the statute.

The Ship Mortgage Act was enacted as a part of the Merchant Marine Act, 1920, being Section 30 thereof (Act of June 5, 1920, Chapter 250). The first section of the Merchant Marine Act, 1920, discloses the intention of Congress with respect to the entire subject matter wherein it is recited:

> "It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine."

In keeping with such declaration of policy the Merchant Marine Act, by Section 11 thereof, created a construction loan fund for the purpose of furnishing loans to citizens in aid of the construction of new vessels and requiring security by way of first lien upon the vessel so constructed. By subsequent amendment, adopted in 1924, it was provided that upon completion of the vessel such security should include a preferred mortgage complying with the provisions of Section 30 of the Act. The provisions respecting construction loans and security therefor have been amended and re-enacted by the following statutes:

Act June 6, 1924, Ch. 273, Sec. 1, 43 Stat. 467;
Act Mar. 4, 1927, Ch. 512, Sec. 1, 44 Stat. 1451;
Act May 22, 1928, Ch. 675, Sec. 301(a), 45 Stat. 690;
Act Feb. 2, 1931, Ch. 100, 46 Stat. 1059.

When considered in the light of the prior provisions of the Merchant Marine Act referred to, the intendment of Congress in enacting the Ship Mortgage Act is a logical development of the national policy expressed in the Merchant Marine Act. If reference to Congressional debates is necessary to determine the intention of Congress, it is evidenced by the remarks of Senator Wesley L. Jones, reporting for the Senate Committee on Commerce (Senate Reports, Vol. I, 66th Congress, 2nd Session, page 9 of Report #573), who said:

> "Mortgage security on ships now is practically worthless. We make it good except as to certain demands, which should be superior to everything else, such as wages. We want our people and capital interested in shipping and shipping securities. If we can bring this about, one of the greatest problems of our merchant marine will be solved. The English people are financially interested in their shipping. We must have our people interested in ours."

Under the construction given to the statute by the court below, in every suit *in rem* brought for the foreclosure of a preferred mortgage the first field of inquiry will necessarily be whether or not the proceeds beyond an inconsiderable portion, were devoted to maritime uses. If not, did the mortgagee have knowledge at the time the mortgage was given that the mortgagor intended to apply a substantial part of the proceeds to non-maritime uses? If the question of knowledge or lack of knowledge is disputed, the Court must retain jurisdiction in the first instance solely for the purpose of deciding this disputed question of fact. If advance knowledge be found, the Court must order a dismissal for lack of jurisdiction. The majority

opinion further leaves it to the discretion of individual judges to determine what part of the proceeds may be devoted to non-maritime uses before jurisdiction is destroyed. A mere statement demonstrates the utter fallacy of the reasoning. Jurisdiction may be defeated only by destroying the preferred status of the mortgage itself.

Moreover, it follows from the language of the Act itself that Congress did not intend to impose any implied limitations on the use of the proceeds of preferred mortgages given under the Act. Such result is fairly evidenced by the express provisions of paragraph (e) of Subsection D of the Act (see appendix).

By this section, Congress has made express provision for a single mortgage covering a ship concurrently with any other conceivable form of property, and has provided that the sole requirement necessary to be observed for the maintenance of such mortgage as a preferred mortgage on the vessel shall be a provision contained in the mortgage providing for a separate discharge of such other property by the payment of a specified portion of the mortgage indebtedness and by the endorsement on the vessel's documents of the amount so required to be paid.

The intention ascribed to Congress by the majority of the Circuit Court of Appeals is further negatived by Section 11 of the Merchant Marine Act, 1920, as amended, to which we have already directed attention, providing for the loan of funds in aid of private construction of vessels, concededly a non-maritime use.

Peoples Ferry Co. v. Beers, 20 How. 393.

It is obvious that Congress contemplated no allocation of the proceeds of such a mortgage to specific uses. If such had been the intention of Congress, unquestionably specific provision therefor would have been incorporated in the statute. The construction indulged by the majority of the Circuit Court of Appeals is not based upon the language of the Ship Mortgage Act. Indeed, such construction conflicts with the intention of Congress as expressed in paragraph (e) of Subsection D of the Act (see appendix); and no other provision of the Ship Mortgage Act lends support to the conclusion reached.

The petitioner contends:

1. That the Act creates a preferred mortgage lien on ships in every case where the requirements of the Act are strictly observed.

2. That it was not the intention of Congress to limit the use of the proceeds of preferred mortgages to maritime purposes in order to maintain a preferred status of the mortgage.

3. That Congress has full authority under Article III, Section 2 of the Constitution to create a new preferred mortgage lien on ships irrespective of the use to which the proceeds of the mortgage may be put.

4. That in creating a preferred mortgage lien Congress had authority to displace other maritime liens on ships making them secondary to a preferred mortgage lien.

5. That Congress, in thus creating a preferred mortgage lien, had authority to vest exclusive juris-

diction in the District Courts, sitting in admiralty, over an action *in rem* for the foreclosure of the mortgage lien.

6. That if Congress has the power under Article III, Section 2 of the Constitution to create a preferred mortgage lien, jurisdiction over an action *in rem* to foreclose the lien would automatically vest in the District Court by force of the general grant of jurisdiction to that Court by the Judiciary Act.

Article III, Section 2 of the Constitution extends the judicial power to "all cases of admiralty and maritime jurisdiction".

Article I, Section 8 confers upon Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof".

Collectively, the sections quoted constitute the basis of the authority of Congress over the subject matter.

The purpose of the grant was to place the entire subject matter, both substantive law and procedure, under federal control, because of its intimate relation to interstate and foreign commerce and to navigation, and it may be added—to ships, the sole instruments of navigation.

The Lottawanna, 21 Wall. 558;
The Belfast, 7 Wall. 624;
Waring v. Clarke, 5 How. 441;
Panama R. R. Co. v. Johnson, 264 U. S. 375.

Construing and applying the quoted provisions of the Constitution, this Court in *Panama Railroad Co. v. Johnson, supra,* said:

> "Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly vesting such power in the United States. Commentators took that view, Congress acted on it, and the courts, including this Court, gave effect to it. Practically, therefore, the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded, or as being only the law of the several states, but as having become the law of the United States, —subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require."

In the case of *The Lottawanna, supra,* this Court said at page 577:

> "It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable."

In the case of *Southern Pacific Company v. Jensen,* 244 U. S. 205, this Court said at page 215:

> "Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

Citations might be multiplied which establish that Congress has power within the limits of the Constitution to alter, qualify, revise or supplement the general maritime law whenever experience or changing conditions make it desirable or necessary.

Recent cases reaffirming the principle are:

Crowell v. Benson, 285 U. S. 22;

United States v. Flores, 289 U. S. 137.

Illustrations of the repeated exercise by Congress of its power to make substantive changes in the law maritime embrace the following:

By the Judiciary Act of 1789 (Act. Sept. 24, 1789, Ch. 20, Sec. 9; 1 Stat. 76) Congress provided that the District Courts have jurisdiction, in admiralty, of cases of seizure under the impost, navigation or trade laws. This declaration by Congress—contemporary with the adoption of the Constitution—is a significant evidence of the amplitude of the power of Congress as then understood. The jurisdiction so conferred was several times thereafter upheld by this Court.

The Margaret, 9 Wheat. 421;

Waring v. Clarke, supra.

The Act of March 3, 1851 (Ch. 43, 9 Stat. 635, 636), providing for limitation of liability of vessel owners, made a radical change in our substantive maritime law. The opinion of this Court in the case of *The Main v. Williams,* 152 U. S. 122, is authority for the statement that the enactment was adopted as a consequence of the rejection by this Court of the plea of limitation of responsibility urged by a water carrier before this Court in 1848 in the case of *The New Jersey Steam Navigation Co. v. The Merchant's Bank,* 6 How. 344. Uneasiness being thereby produced among ship owners, Congress enacted the measure in order to place American shipping on a parity with the principal maritime nations.

By the Act of June 26, 1884, (Ch. 121, Sec. 18; 23 Stat. 57, 46 U. S. C. 189) Congress further radically extended the operation of the Limited Liability Act by providing for the limitation of the individual liability of a ship owner to the proportion of any and all debts and liabilities his individual share of the vessel bore to the whole. In *Richardson v. Harmon,* 222 U. S. 96, this Court held that the provisions of the Act of June 26, 1884, extended to and included non-maritime torts, and determined that the owner of a vessel could limit his liability in admiralty for the destruction of a bridge, concededly a land structure. The analogy to the case at bar is close and persuasive. The vessel itself is the instrument of navigation and the foundation of jurisdiction, in each case. The liability of the vessel represents the expansion of the jurisdiction; in the one case, liability for torts; in the other for the mortgage money. The admiralty characteristic comes, however, from the first element, the vessel, and is not dependent at all on the second element, the liability. It follows that the use which is made of the second element may be completely non-maritime; in the one case, injury to land structure, in the other, use of the mortgage money for loans to land enterprises.

The Act of June 23, 1910 (Ch. 373, 36 Stat. 604) created a maritime lien for supplies furnished in the home port of a vessel where no lien had theretofore existed under our general maritime law.

This Court, in the case of *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.,* 254 U. S. 1, said that the purpose of the enactment was threefold:

(1) To do away with the distinction theretofore existing between supplies furnished in a foreign port and supplies furnished in the home port of a vessel; (2) To do away with the doctrine that materialmen did not intend to rely upon the credit of the vessel when the owner contracted or was present in person; (3) To substitute a single federal statute for state statutes of varying import respecting liens for repairs and supplies.

By the re-enactment of this statute into the Merchant Marine Act of 1920, as Subsection P of Section 30 and succeeding sections, Congress reaffirmed its prior creation of a maritime lien for necessaries furnished a vessel, whether foreign or domestic; thus emphasizing its power over the subject matter.

The Act of March 4, 1915, Chapter 153, Section 20, commonly known as the Jones Act, extended to injured seamen the rights accorded by the Federal Employer's Liability Act and permitted such rights to be administered either in state or federal courts. In granting such rights, Congress modified our prior maritime law giving to injured seamen allowances for wages and for maintenance and cure. See *Lindgren v. United States*, 281 U. S. 38.

In 1927, Congress enacted the statute known as the Longshoremen's and Harbor Workers' Compensation Act (Act Mar. 4, 1927, Ch. 509, Sec. 1; 44 Stat. 1424; 33 U. S. C. Ch. 18). This statute, which is designed to provide compensation for injured maritime workers where recovery be not validly provided by state law was declared by this Court in the case of *Crowell v.*

Benson, supra, to have been a valid exercise by Congress of its power to alter and revise the maritime law which prevails throughout the country.

To the Federal Courts was allocated the function of declaring the law. In exercising the function the courts in all cases of conflict in rules of decision between maritime nations adopted the rule which seemed best suited to the peculiar needs of this country. Congress was given the power to modify any rule of substantive law, but in the absence of action by Congress this Court has, and has exercised, the power to change or modify the law as experience or changing conditions may require. An illustration of the exercise of this power is the case of *The Genesee Chief,* 12 How. 443, in which this Court expressly overruled the case of *The Thomas Jefferson,* 10 Wheat. 428. In the latter case this Court had limited the jurisdiction of admiralty to tidal waters. In *The Genesee Chief, supra,* the decision was expressly overruled and actual navigability made the test for determining the extent of admiralty jurisdiction.

In the last analysis the decision of the Court in the case of *The Genesee Chief, supra,* was merely an interpretation of the Constitution, not only in the light of changing conditions and the lessons of experience, but as well because of factors which were not considered when the case of *The Thomas Jefferson* was decided.*

---

* This power of the Court to overrule prior decisions has been frequently exercised (see cases Note II, dissenting opinion of Mr. Justice Brandeis in **Burnet v. Coronado Oil & Gas Co.**, 285 U. S. 393, at pages 407 and 408).

A recent exercise of the power of the Court generally is found in the case of **Funk v. United States**, 290 U. S. 371, wherein an ancient rule of the common law was abrogated—this though there is no national common law. The only apparent limitation on the power of the Court in this regard is the doctrine of **Stare Decisis** which can have no application in the present case.

Mention is made of this recognized power of the Court for the reason that the majority of the court below seem to be imbued with the theory that since this Court said in the case of *Bogart v. The John Jay,* 17 How. 399, that a chattel mortgage on a ship did not possess sufficient of the elements of a maritime loan to give a district court, sitting in admiralty, jurisdiction over an action *in rem* to foreclose it, the decision marks the boundary for all time beyond which neither Court nor Congress may go, and that, therefore, the Act of Congress creating preferred mortgages on ships is constitutional only if the proceeds of the mortgage in their substantial entirety are devoted to maritime uses. The same theory was previously unsuccessfully urged in the case of *The Oconee,* 280 Fed. 927; *The Nanking,* 292 Fed. 642; and *The Lincoln Land,* 295 Fed. 358.

The constitutionality of the Ship Mortgage Act was first attacked in the case of *The Oconee, supra.* It was there urged (1) that the limits of the admiralty and maritime jurisdiction granted by Article III, Section 2 of the Constitution are co-extensive only with the jurisdiction exercised by the admiralty courts at the time of the adoption of the Constitution; (2) that Congress had no power, express or implied, to extend those limits then exercised; (3) that since under the general maritime law, as declared in the case of *Bogart v. The John Jay, supra,* admiralty had no jurisdiction over an action to foreclose a mortgage on a ship, it was not within the power of Congress to enlarge that jurisdiction, and finally (4) that this resulted from the fact that a mortgage on a ship was essentially non-maritime because it involved only property rights and had nothing to do

with navigation. The contentions there made were conclusively answered by Judge Groner in an opinion based on sound reasoning and supported by abundant authority.

The constitutionality of the Act was again attacked in the case of *The Nanking, supra,* in which the same contentions were urged. Judge Partridge in his opinion suggests additional reasons not found in the opinion of Judge Groner for sustaining the constitutionality of the Act.

The constitutionality of the Act was again attacked in the case of *The Lincoln Land, supra.* Judge Brewster upheld the constitutionality of the Act on the reasoning of Judge Groner in *The Oconee, supra.*

Cases in district courts and in circuit courts of appeal where the validity of the Act was assumed are the following:

The Egeria, 294 Fed. 791 (C. C. A. 9);
The Northern Star, 7 Fed. (2d) 505 (C. C. A. 2);
National Bank v. Enterprise Marine Dock Co., 43 Fed. (2d) 547 (C. C. A. 4);
Consumer's Co. v. Goodrich Transit Co., 53 Fed. (2d) 972, (C. C. A. 7) Cert. denied 286 U. S. 548;
The Owego, 292 Fed. 403 (E. D. La.);
The Northern No. 41, 297 Fed. 343 (S. D. Florida);
The Moshulu, 298 Fed. 348 (N. D. Cal.);
The Henry W. Breyer, 17 Fed. (2d) 423, (D. Maryland);
The Red Lion, 22 Fed. (2d) 329, (E. D. N. Y.).

In the case of *Morse Drydock & Repair Co. v. Steamer Northern Star,* 271 U. S. 552, counsel apparently regarded the constitutionality of the Act as so well established that the question was not raised and this Court, in deciding the case, assumed that the Act was valid and constitutional.

Again, in the case of *United States v. Flores, supra,* this Court cited the case of *The Oconee, supra,* with approval.

Little is to be added to the cogent reasoning of Judge Groner and Judge Partridge in sustaining the validity of the Act in question. This, however, may be suggested:

To ships, from ancient times, have been ascribed attributes not possessed by any other form of property. Under the general maritime law the ship is regarded as a *personified res* against which the maritime lien or "privilege" directly operates. Though inanimate, the ship, being a *personified res,* within the limits not necessary to detail, is directly liable to the same extent as a person or corporation, Though inanimate, the negligence of its master and crew fixes direct liability upon it. The act of the master or owner in procuring supplies or repairs produces the same result. Her status and peculiar attributes are best described by Mr. Justice Brown in the case of *Tucker v. Alexandroff,* 183 U. S. 424, at page 438, as follows:

> "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron —an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and

enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes *a subject of admiralty jurisdiction.* She acquires a personality of her own, becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. *The China,* 7 Wall. 53, sub. nom., *The China v. Walsh,* 19 L. Ed. 67; *Thorp v. Hammond,* 12 Wall. 408, 20 L. Ed. 419; *Workman v. New York City,* 179 U. S. 552, 45 L. Ed. 314, 21 Sup. Ct. Rep. 212; *United States v. The Little Charles,* 1 Brock, 347, 354; Fed. Cas. No. 15,612; *The John G. Stevens,* 170 U. S. 123, 125, 126, 42 L. Ed. 973, 974, 18 Sup. Ct. Rep. 544; *Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique,* 182 U. S. 406, 45 L. Ed. 1155, 21 Sup. Ct. Rep. 831. She is capable too, of committing a tort, and is responsible in damages therefor. She may also become a *quasi* bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations and perhaps be subjected to a second sale." (Italics ours.)

Finally, the ship, to quote from the language of Judge Augustus N. Hand in his dissenting opinion, is "not only the very symbol but the instrument of marine jurisdiction." Without the ship there can be no general maritime law. Without the ship there would, therefore, be no courts of admiralty for there would be no water-borne commerce. Without the ship there would be nothing to which maritime jurisdiction could attach. Without the ship the language of the Constitution under discussion would be without application or meaning.

The suggested considerations were perhaps in the minds of the Court when Mr. Justice Wayne, writing for the Court in the case of *Bogart v. The John Jay, supra,* and referring to the extension of English Admiralty Jurisdiction over marine mortgages by virtue of Stat. 3 and 4, Vict., Chapter 65, said "until that shall be done in the United States by Congress the rule in this particular must continue in the admiralty courts of the United States as it has been."

The quotation evidences the fact that the Court, as then constituted, had no doubt as to the power of Congress to so extend the jurisdiction.

The question decided in the case of *Bogart v. The John Jay, supra,* was purely one of jurisdiction. It is obviously the function of the Court, and not of Congress, to mark the boundaries within which substantive law operates. The rule by which the boundaries are thus marked is stated by this Court in *Panama R. R. Co. v. Johnson, supra,* at page 386, as follows:

> "When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without."

Is then the hypothecation of a ship, the sole instrument upon which the general maritime law operates, so essentially non-maritime in character as to forever

preclude either Court or Congress from making it a subject of admiralty jurisdiction, except in cases where the proceeds of the mortgage are devoted in their substantial entirety to maritime uses? Judge Partridge pertinently suggests in the case of *The Nanking, supra,* at page 644, that the distinction between a bottomry bond and a ship mortgage is not as wide as the Court infers in the case of *The John Jay, supra.* Jurisdiction of admiralty courts over bottomry bonds is unquestionable.

Time and experience having added light to the language of the Constitution, the decision of this Court in the case of *Bogart v. The John Jay, supra,* presents no present obstacle to the power of Congress to enact the statute in question or the power of the Court to declare it constitutional.

POINT II.

If the power of Congress has been validly exercised and the mortgages in suit are preferred mortgage liens under the Act, the jurisdiction of the District Court over an action *in rem* to enforce them necessarily follows.

The Constitution extended the judicial power to "all cases of admiralty and maritime jurisdiction." The grant became operative when the Congress under Article I, Section 8 of the Constitution created tribunals inferior to the Supreme Court and defined the jurisdiction of all inferior tribunals and the appellate jurisdiction of this Court.

Upon the organization of the Courts the determination of the boundaries of the jurisdiction under Article III, Section 2 of the Constitution of both courts and the Congress became a judicial function.

The St. Lawrence, 1 Black 522, 527;
The Belfast, supra, at pages 640, 641;
The Lottawanna, supra, at pages 575-576;
Butler v. Boston & Savannah S. S. Co., 130 U. S. 527, at page 557;
The Blackheath, 195 U. S. 361, 365;
Panama R. R. Co. v. Johnson, supra, at page 386;
Crowell v. Benson, supra, at page 55.

It results that the jurisdiction of Congress is circumscribed by the boundaries fixed by the Court; and the latter in determining the extent of the jurisdiction of the Congress, at the same time determines the limits of its own jurisdiction over the subject matter. Thus the jurisdiction of the Court goes hand in hand with the power of Congress, touching at every point. If the power of Congress has been validly exercised under the Constitution, as interpreted by the Court, jurisdiction of the admiralty court over the subject matter automatically attaches by virtue of 28 U. S. C. Section 41, subdivision 3. The language of the section is the same as the language of the Constitution, and it necessarily follows that the jurisdiction is co-extensive with the terms of the grant of judicial power over the subject matter by the Constitution.

Insurance Co. v. Dunham, 78 U. S. 1.

Since the decision of this Court in the case of *The Genesee Chief* made the navigable character of the

public waters the jurisdictional test of the geographical boundaries, it follows as a necessary corollary that the ship is the fundamental object of the jurisdiction and the waters where the ship may navigate mark the territorial limits of the jurisdiction over the object.

The principal subjects of jurisdiction are three—contracts, crimes and torts. Whether a contract is maritime or not depends on the nature and character of the contract *(Insurance Co. v. Dunham, supra)* though there must be a union of ship and cargo to give rise to jurisdiction *in rem.*

Kaisha v. Pacific Export Lumber Co., 260 U. S. 490;
The Saturnus, 250 Fed. 407.

If the contract be maritime in its nature, jurisdiction *in personam* attaches though there exists no maritime lien or privilege.

Insurance Co. v. Dunham, supra.

If the object of the contract is a maritime service, jurisdiction attaches either *in rem* or *in personam*, or both; for the breach of a contract of affreightment *(i. e.*, a failure to perform a maritime service) jurisdiction *in personam* attaches; for a breach after a union of ship and cargo, jurisdiction *in rem* also attaches. In the former, navigation was contemplated but not performed; in the latter, it was wrongfully performed.

Crimes committed aboard a vessel of the United States have no connection with navigation but none the less the power of Congress over crimes and their pun-

ishment, by virtue of Article III, Section 2 of the Constitution, is undoubted.

United States v. Flores, supra.

The opinion in this case makes it clear that the basis of jurisdiction is the ship—the sole instrumentality upon which the admiralty and maritime jurisdiction operates, and that such jurisdiction extends to any waters where the ship may navigate.

Maritime torts necessarily involve navigation. Action is essential to give rise to the tort. Locality is, therefore, the test of jurisdiction but obviously the basis of the jurisdiction is still the ship. The territorial limits of that jurisdiction are, again, all waters in which the ship may navigate.

It, therefore, follows that in the classes mentioned as well as those not mentioned, it is the ship which furnishes the essential basis of the jurisdiction; that the jurisdiction attaches because the ship is the sole instrumentality of navigation; that without the ship there could be no maritime contracts; without the ship there could be no maritime torts; without the ship there could be no crimes over which admiralty exercises jurisdiction, and without the ship there would be no maritime law to be applied.

That the ship is the fundamental basis for the attachment of admiralty jurisdiction of the Court seems to be made manifest by the case of *Richardson v. Harmon, supra.* In that case jurisdiction of the admiralty court to limit liability was sustained solely by force of the Judiciary Act noted above, and notwithstanding that

the tort was concededly non-maritime. To be sure navigation was involved. Action was required to give rise to negligence; but would the result be different if limitation be sought for damage to buildings by fire negligently caused by those in charge of a ship lying sunk at a wharf? *

A valid preferred mortgage lien having been created by Congress, jurisdiction of the admiralty court would follow by virtue of the jurisdiction conferred by the Judiciary Act without express enactment. But the Congress has not left the question of jurisdiction to implication. By the express provisions of Subsection K of the Ship Mortgage Act (see appendix) Congress has vested exclusive jurisdiction in the District Courts *in rem* to foreclose the lien of the preferred mortgage. This presents no anomaly. Both by virtue of grant of general jurisdiction by the Judiciary Act, as well as by the express provisions of Subsection K of the Ship Mortgage Act, if the subject matter of the Act is within the language of the Constitution, and thus a valid exercise of the power of Congress, exclusive jurisdiction vests in the District Court over an action *in rem* brought for the foreclosure of a preferred mortgage lien, and that jurisdiction may be defeated only by the destruction of the preferred status of the mortgage.

Ships are the sole instrumentalities of water-borne commerce over which Congress, under its maritime jurisdiction, has complete control. The act in question merely creates a preferred mortgage lien against these instrumentalities and subordinates all maritime liens,

* Limitation in admiralty was had on this state of facts in the case of The West Point, 271 Fed. 502. See also The Omar D. Conger, 1 Fed. (2d) 732.

except those expressly enumerated in the statute, to the mortgage lien thus created. The same power that can create new maritime liens and limit liability of shipowners for all liabilities, including non-maritime torts, can most certainly authorize the hypothecation of a ship, a *personified res*. Having the power to create the preferred mortgage lien, Congress most certainly can provide for the enforcement of such a lien in the District Courts of the United States.

POINT III.

The construction given to the Ship Mortgage Act by the majority of the Court below largely impairs, if not completely defeats, the purpose of Congress in enacting the statute.

The language of the Ship Mortgage Act (printed in the appendix) is precise, definite and certain.

Subsection D enumerates in detail every step to be taken in order that the mortgage may attain the preferred status created by the Act. Strict compliance with every requirement of the Act is, therefore, necessary.

The mortgage having attained such a preferred status through strict compliance with the Act, Subsection K provides that such a preferred mortgage shall constitute a lien upon the mortgage vessel.

By the provisions of Subsection K, upon default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit *in rem* in ad-

miralty, of which suit exclusive original jurisdiction is granted to the District Courts of the United States.

Subsection M provides that upon the sale of any mortgaged vessel by order of the District Court in any such action *in rem* for the enforcement of a preferred mortgage lien, such lien shall have priority over all claims against the vessel, except certain specific liens (therein denominated preferred maritime liens), and the costs and expenses of such action.

The libels in these cases allege a full and complete compliance with every provision of the Ship Mortgage Act necessary to make the mortgages preferred mortgages under the Act. The answers interposed *admit* that every act and thing necessary to be done was done to make these mortgages preferred mortgages under the Act, and further expressly admit that the mortgages are preferred mortgages under the Act.

The majority opinion of the Circuit Court of Appeals in these cases has, for the first time, grafted on to the Ship Mortgage Act, a further and additional condition not warranted by the language of the Act, and which would seem to be negatived by the express terms of the Act. This condition imposed by the Court below, in effect, is that no matter how strict the compliance with the express provisions of the Act, if the intention existed, known to both mortgagor and mortgagee, to devote a substantial portion of the proceeds to non-maritime uses, the preferred status accorded by the Act is not attained, at least insofar as jurisdiction of the District Court to enforce the preferred mortgage lien following default is concerned.

That Congress did not contemplate any allocation of the proceeds of a preferred mortgage to specific uses is evident from the lack of any express provision therefor in the context of the Ship Mortgage Act. Moreover, that Congress did not intend any implied limitation on the use of the proceeds is fairly evidenced (as heretofore pointed out in Point I) by the express provisions of paragraph (e) of Subsection D of the Act (see appendix), as well as by the provisions of Section 11 of the Merchant Marine Act, 1920, of which the Ship Mortgage Act constituted a part.

No provision of the Ship Mortgage Act lends support to the conclusion reached.

The majority opinion of the Circuit Court of Appeals purports to defeat jurisdiction of the District Court upon the single ground that the mortgagor and mortgagee had knowledge at the time the mortgages were executed that a substantial part of the proceeds was to be devoted to non-maritime uses.

The jurisdiction granted by the Ship Mortgage Act cannot be defeated except by the destruction of the preferred status of the mortgages. But the preferred status attained through compliance with the conditions of the statute may not in these cases be destroyed. Reference to the respective mortgages which are attached to and expressly made a part of the libels (R. 5, 40) shows that the mortgagor solemnly covenanted and engaged that all requisite corporate action on its part for the execution and delivery of the bonds and of the respective mortgages had been taken (R. 17-18, 51-52); that the mortgagor would, in all

respects, comply with the provisions of the Ship Mortgage Act so as to create and maintain the respective mortgages as preferred mortgages within the provisions of the Act, and would perform such acts as requested by the Trustee, as reasonably calculated to preserve the preferred status of the mortgages until fully paid and performed (R. 20, 54). Moreover, Article XIII of the respective mortgages provides:

> "Preferred Mortgage.
> That the mortgagor shall comply with and satisfy all the provisions of the 'Ship Mortgage Act, 1920' and shall establish and maintain this mortgage as a first preferred mortgage under said Act". (R. 22, 56).

In the face of these covenants contained in the mortgages, the preferred status of the mortgages in suit cannot be destroyed and the jurisdiction of the District Court over actions *in rem* to enforce such preferred mortgages necessarily follows.

Moreover, if effect be given to the admissions contained in the answers interposed herein and to the binding character of the specific affirmative covenants contained in the preferred mortgages at bar, the mortgagor was estopped from offering testimony either for the purpose of attacking the validity of the mortgages or of defeating the jurisdiction of the Court to enforce the mortgages. Notwithstanding, the majority opinion of the Court below is based upon this wholly incompetent testimony.

The strained and illogical construction placed upon the Ship Mortgage Act by the majority of the Circuit Court of Appeals will have the inevitable effect of

largely impairing, if not completely defeating, the purpose of Congress in enacting the legislation. The fostering, development and protection of our national merchant marine has been, and is, the time honored and fixed policy of our government. The Ship Mortgage Act, 1920, together with the Merchant Marine Act, 1920, of which it was enacted as a part, were enacted by Congress in furtherance of that policy. As a result of such enactment, the building of ships and the investment of capital therein were intended to be promoted. But, under the majority decision of the Court below, purchasers of bonds secured by preferred mortgages given under the Ship Mortgage Act will no longer be able to rest secure upon the assurance which should follow from a strict compliance with the express provisions of the Ship Mortgage Act. For strict compliance will afford no assurance, since under the decision of the majority of the Court below, that assurance may be completely destroyed by testimony *aliunde* the instrument itself relating to how the moneys thus secured were to be expended. By thus opening wide the door for attack upon preferred mortgages through testimony *dehors* the instruments themselves, the value of such bonds as a security will be largely impaired, if not completely destroyed in individual cases. The pernicious effect upon future efforts to obtain financing upon the security of preferred mortgages is certain.

Moreover, the decision of the Court below serves to introduce a basis for refined and technical distinctions dependent upon the discretion of the individual judge as to the character of the use to which the proceeds were put. This necessarily will result in great un-

certainty in litigation respecting preferred mortgages; and, in turn, will react upon the value of the security itself and will contribute to further impair the usefulness which Congress intended should be made of preferred mortgages. Obviously, the public will not purchase this type of security under such circumstances, nor can the Federal Government justify further application of public moneys in aid of ship construction under such circumstances.

It follows that if this decision stands, the purpose of Congress in enacting the Ship Mortgage Act will be defeated.

CONCLUSION.

The decrees of the Circuit Court of Appeals herein should be reversed and the decrees of the District Court should be affirmed, with costs.

August 25, 1934, Buffalo, New York.

Respectfully submitted,

RAY M. STANLEY,
ELLIS H. GIDLEY,
FERRIS D. STONE,
CLEVELAND THURBER,
Counsel for Petitioner,
Detroit Trust Company, Trustee.

APPENDIX.

Ship Mortgage Act.

Act June 5, 1920, Chapter 250, Section 30, (Subsections A—W); 41 Stat. 1000-1006; 46 U. S. C., Chapter 25, Sections 911-984.

Subsection A; (41 Stat. 1000; 46 U. S. C. Sec. 984)

"Ship Mortgage Act." Section 30 Act of June 5, 1920, Chapter 250, may be cited as the "Ship Mortgage Act, 1920."

Subsection B; (41 Stat. 1000; 46 U. S. C. Sec. 911)

Words and Terms used in Chapter. When used in this chapter—

(1) The term "document" includes registry and enrollment and license;

(2) The term "documented" means registered or enrolled or licensed under the laws of the United States, whether permanently or temporarily;

(3) The term "port of documentation" means the port at which the vessel is documented, in accordance with law;

(4) The term "vessel of the United States" means any vessel documented under the laws of the United States and such vessel shall be held to continue to be so documented until its documents are surrendered with the approval of the board; and

(5) The term "mortgagee", in the case of a mortgage involving a trust deed and a bond issue thereunder, means the trustee designated in such deed.

Subsection C; (41 Stat. 1000; 46 U. S. C. Sec. 921)

Sale, Conveyance, or Mortgage of Vessel of the United States; Record. (a) No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, includes a vessel of the United States, or any portion thereof, as the whole or any part of the property sold, conveyed, or mortgaged shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is re-

corded in the office of the collector of customs of the port of documentation of such vessel, as provided in subdivision (b) of this subsection.

(b) Such collector of customs shall record bills of sale, conveyances, and mortgages, delivered to him, in the order of their reception, in books to be kept for that purpose and indexed to show—

(1) The name of the vessel;

(2) The names of the parties to the sale, conveyance or mortgage;

(3) The time and date of reception of the instrument;

(4) The interest in the vessel so sold, conveyed or mortgaged; and

(5) The amount and date of maturity of the mortgage.

Subsection D; (41 Stat. 1000; 46 U. S. C. Sec. 922)

Preferred Mortgages. (a) A valid mortgage, which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upward, shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of Subsection M, section 953, if—

(1) The mortgage is indorsed upon the vessel's documents in accordance with the provisions of this chapter;

(2) The mortgage is recorded as provided in subsection C, section 921, together with the time and date when the mortgage is so indorsed;

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States.

(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this chapter called a "preferred mortgage" as to such vessel.

(c) There shall be indorsed upon the documents of a vessel covered by a preferred mortgage—

(1) The names of the mortgagor and mortgagee;

(2) The time and date the indorsement is made;

(3) The amount and date of maturity of the mortgage; and

(4) Any amount required to be indorsed by the provisions of subdivision (e) or (f) of this subsection.

(d) Such indorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for the vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs.

(e) A mortgage which includes property other than a vessel shall not be held a preferred mortgage unless the mortgage provides for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness. If a preferred mortgage so provides for the separate discharge, the amount of the portion of such payment shall be indorsed upon the documents of the vessel.

(f) If a preferred mortgage includes more than one vessel and provides for the separate discharge of each vessel by the payment of a portion of the mortgage indebtedness, the amount of such portion of such payment shall be indorsed upon the documents of the vessel. In case such mortgage does not provide for the separate discharge of a vessel and the vessel is to be sold upon the order of a district court of the United States in a suit *in rem* in admiralty, the court shall determine the portion of the mortgage indebtedness increased by 20 per centum (1) which, in the opinion of the court, the approximate value of the vessel bears

to the approximate value of all the vessels covered by the mortgage, and (2) upon the payment of which the vessel shall be discharged from the mortgage.

Subsection E; (41 Stat. 1001; 46 U. S. C. Sec. 923)

Certified Copies of Mortgage; Exhibition. The collector of customs upon the recording of a preferred mortgage shall deliver two certified copies thereof to the mortgagor who shall place, and use due diligence to retain, one copy on board the mortgaged vessel and cause such copy and the documents of the vessel to be exhibited by the master to any person having business with the vessel, which may give rise to a maritime lien upon the vessel or to the sale, conveyance, or mortgage thereof. The master of the vessel shall, upon the request of any such person, exhibit to him the documents of the vessel and the copy of any preferred mortgage of the vessel placed on board thereof.

Subsection F; (41 Stat. 1002; 46 U. S. C. Sec. 924)

Prior and Subsequent Maritime Liens on Mortgaged Vessel. The mortgagor (1) shall, upon request of the mortgagee, disclose in writing to him prior to the execution of any preferred mortgage, the existence of any maritime lien, prior mortgage, or other obligation or liability upon the vessel to be mortgaged, that is known to the mortgagor, and (2), without the consent of the mortgagee, shall not incur, after the execution of such mortgage and before the mortgagee has had a reasonable time in which to record the mortgage and have indorsements in respect thereto made upon the documents of the vessel, any contractual obligation creating a lien upon the vessel other than a lien for wages of stevedores when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, or for salvage, including contract salvage, in respect to the vessel.

Subsection G; (41 Stat. 1002; 46 U. S. C. Sec. 925)

Record of Notice of Claim of Lien on Mortgaged Vessel; Discharge of Lien. (a) The collector of customs of the port of documentation shall upon the request of any person, record notice of his claim of a lien upon a vessel covered by a preferred mortgage, together with the nature, date of creation, and amount of the lien, and the name and address of the person. Any person who has caused notice of his claim of lien to be so recorded shall, upon a discharge in whole or in part of the indebtedness, forthwith file with the collector of customs a certificate of such discharge. The collector of customs shall thereupon record the certificate.

(b) The mortgagor upon a discharge in whole or in part of the mortgage indebtedness, shall forthwith file with the collector of customs for the port of documentation of the vessel, a certificate of such discharge. Such collector of customs shall thereupon record the certificate. In case of a vessel covered by a preferred mortgage, the collector of customs at the port of documentation shall (1) indorse upon the documents of the vessel, or direct the collector of customs at any port in which the vessel is found, to so indorse, the fact of such discharge, and (2) shall deny clearance to the vessel until such indorsement is made.

Subsection H; (41 Stat. 1002; 46 U. S. C. Sec. 926)

Conditions Precedent to Record; Interest on Preferred Mortgage. (a) No bill of sale, conveyance, or mortgage shall be recorded unless it states the interest of the grantor or mortgagor, in the vessel, and the interest so sold, conveyed or mortgaged.

(b) No bill of sale, conveyance, mortgage, notice of claim of lien, or certificate of discharge thereof, shall be recorded unless previously acknowledged before a notary public or other officer authorized by a law of the United States, or of a State, Territory, District, or possession thereof, to take acknowledgment of deeds.

(c) In case of a change in the port of documentation of a vessel of the United States, no bill of sale, conveyance, or mortgage shall be recorded at the new port of documentation unless there is furnished to the collector of customs of such port, together with the copy of the bill of sale, conveyance, or mortgage to be recorded, a certified copy of the record of the vessel at the former port of documentation furnished by the collector of such port. The collector of customs at the new port of documentation is authorized and directed to record such certified copy.

(d) A preferred mortgage may bear such rate of interest as is agreed by the parties thereto.

Subsection I; (41 Stat. 1002; 46 U. S. C. Sec. 927)

Inspection of and Copies from Records; Fees. Each collector of customs shall permit records, made under the provisions of this chapter to be inspected during office hours under such reasonable regulations as the collector may establish. Upon the request of any person the collector of customs shall furnish him from the records of the collector's office (1) a certificate setting forth the names of the owners of any vessel, the interest held by each owner, and the material facts as to any bill of sale or conveyance of any mortgage covering, or any lien or other incumbrance upon, a specified vessel, (2) a certified copy of any bill of sale, conveyance, mortgage, notice of claim of lien, or certificate of discharge in respect to such vessel, or (3) a certified copy as required by subdivision (c) of subsection H, section 926. The collector of customs shall collect a fee for any bill of sale, conveyance, or mortgage recorded, or any certificate or certified copy furnished, by him, in the amount of 20 cents a folio, with a minimum charge of $1. All such fees shall be covered into the Treasury of the United States as miscellaneous receipts.

Subsection J; (41 Stat. 1003; 46 U. S. C. Sec. 941)

Failure of Master to Exhibit Documents; Unlawful Acts by Mortgagor; Liability of Collector of Customs. (a) If the master of the vessel wilfully fails to

exhibit the documents of the vessel or the copy of any preferred mortgage thereof, as required by subsection E, the board of local inspectors of vessels having jurisdiction of the license of the master, may suspend or cancel such license, subject to the provisions of sections 431 to 434, inclusive.

(b) A mortgagor who, with the intent to defraud, violates any provision of Subsection F, section 924, and if the mortgagor is a corporation or association, the president or other principal executive officer of the corporation or association, shall upon conviction thereof be held guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than two years, or both. The mortgaged indebtedness shall thereupon become immediately due and payable at the election of the mortgagee.

(c) If any person enters into any contract secured by, or upon the credit of, a vessel of the United States covered by a preferred mortgage, and suffers pecuniary loss by reason of the failure of the collector of customs, or any officer, employee, or agent thereof, properly to perform any duty required of the collector under the provisions of this chapter, the collector of customs shall be liable to such person for damages in the amount of such loss. If any such person is caused any such loss by reason of the failure of the mortgagor, or master of the mortgaged vessel, or any officer, employee or agent thereof, to comply with any provision of subsection E or F, section 923 or 924, or to file an affidavit as required by subdivision (a) of subsection D, section 922, correct in each particular thereof, the mortgagor shall be liable to such person for damages in the amount of such loss. The district courts of the United States are given jurisdiction (but not to the exclusion of the courts of the several States Territories, Districts, or possessions) of suits for the recovery of such damages, irrespective of the amount involved in the suit or the citizenship of the parties thereto. Such suit shall be begun by personal service upon the defendant within the limits of the district. Upon judgment for the plaintiff in any such suit, the court shall include in the judgment an additional

amount for costs of the action and a reasonable counsel's fee, to be fixed by the court.

Subsection K; (41 Stat. 1003; 46 U. S. C. Section 951)

Lien of Preferred Mortgage; Foreclosure; Jurisdiction; Procedure. A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit *in rem* in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. In addition to any notice by publication, actual notice of the commencement of any such suit shall be given by the libelant, in such manner as the court shall direct, to (1) the master, other ranking officer, or caretaker of the vessel, and (2) any person who has recorded a notice of claim of an undischarged lien upon the vessel, as provided in subsection G, section 925, unless after search by the libelant satisfactory to the court, such mortgagor, master, other ranking officer, caretaker, or claimant is not found within the United States. Failure to give notice to any such person, as required by this subsection, shall not constitute a jurisdictional defect; but the libelant shall be liable to such person for damages in the amount of his interest in the vessel terminated by the suit. Suit *in personam* for the recovery of such damages may be brought in accordance with the provisions of subdivision (c) of subsection J, section 941.

Subsection L; (41 Stat. 1004; 46 U. S. C. Section 952)

Receiver in Foreclosure; Possession by Marshal. In any suit *in rem* in admiralty for the enforcement of the preferred mortgage lien, the court may appoint a receiver and, in its discretion, authorize the receiver to operate the mortgaged vessel. The marshal may be authorized and directed by the court to take possession of the mortgaged vessel notwithstanding the fact that the vessel is in the possession or under the control of any person claiming a possessory common-law lien.

Subsection M; (41 Stat. 1004; 46 U. S. C. Section 953)

Preferred Maritime Lien; Priorities; Other Liens. (a) When used hereinafter in this chapter, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit *in rem* in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection L, section 952, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court.

Subsection N; (41 Stat. 1004; 46 U. S. C. Section 954)

Suits in Personam in Admiralty on Default. (a) Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this chapter, bring suit *in personam* in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof.

(b) This chapter shall not be construed, in the case of a mortgage covering, in addition to vessels, realty or personalty other than vessels, or both, to authorize the enforcement by suit *in rem* in admiralty of the rights of the mortgagee in respect to such realty or personalty other than vessels.

Subsection O; (41 Stat. 1004; 46 U. S. C. Section 961)

Surrender of Documents; Termination of Mortgagee's Interest; Sale of Mortgaged Vessel. (a) The documents of a vessel of the United States covered by a preferred mortgage may not be surrendered (except in the case of the forfeiture of the vessel or its sale by the order of any court of the United States or any foreign country) without the approval of the board. The board shall refuse such approval unless the mortgagee consents to such surrender.

(b) The interest of the mortgagee in a vessel of the United States covered by a mortgage, shall not be terminated by the forfeiture of the vessel for a violation of any law of the United States, unless the mortgagee authorized, consented, or conspired to effect the illegal act, failure or omission which constituted such violation.

(c) Upon the sale of any vessel of the United States covered by a preferred mortgage, by order of a district court of the United States in any suit *in rem* in admiralty for the enforcement of a maritime lien other than a preferred maritime lien, the vessel shall be sold free from all pre-existing claims thereon; but the court shall, upon the request of the mortgagee, the libelant, or any intervenor, require the purchaser at such sale to give and the mortgagor to accept a new mortgage of the vessel for the balance of the term of the original mortgage. The conditions of such new mortgage shall be the same, so far as practicable, as those of the original mortgage and shall be subject to the approval of the court. If such new mortgage is given, the mortgagee shall not be paid from the proceeds of the sale and the amount payable as the purchase price shall be held diminished in the amount of the new mortgage indebtedness.

(d) No rights under a mortgage of a vessel of the United States shall be assigned to any person not a citizen of the United States without the approval of the board. Any assignment in violation of any provision of this chapter shall be void.

(e) No vessel of the United States shall be sold by order of a district court of the United States in any

suit *in rem* in admiralty to any person not a citizen of the United States.

Subsection P; (41 Stat. 1005; 46 U. S. C. Section 971)

Persons Entitled to Lien. Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem,* and it shall not be necessary to allege or prove that credit was given to the vessel.

Subsection Q; (41 Stat. 1005; 46 U. S. C. Section 972)

Persons Authorized to Procure Repairs, Supplies, and Necessaries. The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

Subsection R; (41 Stat. 1005; 46 U. S. C. Section 973)

Notice to Person Furnishing Repairs, Supplies, and Necessaries. The officers and agents of a vessel specified in Subsection Q, section 972, shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice,* or by an agreed purchaser in possession of the vessel; but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

Subsection S; (41 Stat. 1005; 46 U. S. C. Section 974)

Waiver of Right to Lien. Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed *in personam*, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States.

Subsection T; (41 Stat. 1006; 46 U. S. C. Section 975)

State Statutes Superseded. This chapter shall supersede the provisions of all State statutes conferring liens on vessels, insofar as such statutes purport to create rights of action to be enforced by suits *in rem* in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessaries.

Subsection U; (41 Stat. 1006; 46 U. S. C. Section 981)

Existing Mortgages Not Affected. This chapter shall not apply (1) to any existing mortgage, or (2) to any mortgage hereafter placed on any vessel under an existing mortgage, on June 5, 1920, so long as such existing mortgage remains undischarged.

Subsection V; (41 Stat. 1006; 46 U. S. C. Section 982)

Books for Collectors of Customs. The Secretary of Commerce is authorized and directed to furnish collectors of customs with all necessary books and records, and with certificates of registry and of enrollment and license in such form as provides for the making of all indorsements thereon required by this chapter.

Subsection W; (41 Stat. 1006; 46 U. S. C. Section 983)

Rules and Regulations by Secretary of Commerce. The Secretary of Commerce is authorized to make such regulations in respect to the recording and indorsing of mortgages covering vessels of the United States, as he deems necessary to the efficient execution of the provisions of this chapter.

Provisions Supplementary to Navigation Laws and the Ship Mortgage Act.

ACT FEBRUARY 16, 1925, CHAPTER 235, SECTIONS 2-5; 43 STAT. 948; 46 U. S. C. CHAPTER 26, SECTIONS 1011-1014.

Section 2; (43 Stat. 948; 46 U. S. C. Sec. 1012)

RECORD AT HOME PORT. No bill of sale, conveyance, mortgage, assignment of mortgage, or hypothecation (except bottomry), which includes a vessel of the United States or any portion thereof shall be valid in respect to such vessel against any person other than the grantor or mortgagor, his heirs or devisees, and any person having actual notice thereof, until such bill of sale, conveyance, mortgage, assignment of mortgage, or hypotheeation is recorded in the office of the collector of customs at the home port of such vessel. Any bill of sale or conveyance of the whole or any part of a vessel shall be recorded at the home port of such vessel as shown in her new document.

Section 3; (43 Stat. 948; 46 U. S. C. Sec. 1013)

CONVEYANCES AND OTHER INSTRUMENTS AND ACTS VALIDATED. All conveyances and mortgages of any vessel or any part thereof, and all documentations, recordations, indorsements, and indexing thereof, and proceedings incidental thereto made or done, prior to February 16, 1925, are declared valid to the extent they would have been valid if the port or ports at which said vessel has in fact been doc-

umented from time to time had been the port or ports at which it should have been documented in accordance with law; and this section is declared retroactive so as to accomplish such validations; *Provided,* That nothing herein contained shall be construed to deprive any person of any vested right.

Section 4; (43 Stat. 948; 46 U. S. C. Sec. 1011) PORT OF DOCUMENTATION. Whenever in the Ship Mortgage Act, 1920, otherwise known as section 30 of the Merchant Marine Act, 1920, chapter 25 of this title, the words "port of documentation" are used they shall be deemed to mean the "home port" of the vessel, except that the words "port of documentation" shall not include a port in which a temporary document is issued.

Section 5; (43 Stat. 948; 46 U. S. C. Sec. 1014) NAVIGATION LAWS AND SHIP MORTGAGE ACT AMENDED. All such provisions of the navigation laws of the United States and of the Ship Mortgage Act, 1920, otherwise known as section 30 of the Merchant Marine Act, 1920, chapter 25 of this title, as are in conflict with sections 18, 1011, 1012 and 1013, are amended to conform herewith.

FILE COPY

FILED
OCT 8 19
CHARLES ELMORE CR
CLE

Supreme Court of the United States

October Term, 1934.

No. 13.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

against

Steamer "THOMAS BARLUM", her engines, etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

No. 14.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

against

Steamer "JOHN J. BARLUM", her engines, etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER.

RAY M. STANLEY,
ELLIS H. GIDLEY,
FERRIS D. STONE,
CLEVELAND THURBER,
Counsel for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

SUBJECT INDEX.

Page

The mortgages in suit being concededly valid obligations, the use made of the proceeds is immaterial 2

TABLE OF CASES.

Conard v. The Atlantic Insurance Co. of New York, 1 Peters (26 U. S.) 386 2
Draco, The, Fed. Cases No. 4057 (2 Sumn. 157) 2

IN THE

Supreme Court of the United States

October Term, 1934.

Nos. 13-14.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

against

Steamer "THOMAS BARLUM", her engines, etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

against

Steamer "JOHN J. BARLUM", her engines, etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER.

Since our principal brief was printed the attention of counsel has been called to two cases which appear to be of sufficient importance to justify directing the attention of this Court to them.

The opinions in both cases were written by Mr. Justice Story in the first case cited while sitting in Circuit Court, in the second in this Court.

In the case of *The Draco*, 7 Federal Cases No. 4057 (2 Sumn. 157) the validity of a bottomry bond and the jurisdiction of the Court over an action *in rem* to enforce it were involved. The opinion reviews the law of the principal maritime nations of the world relating to bottomry bonds; details their essential characteristics, and compares them with mortgages in the following language:

> "* * * it being as clear, that it is for maritime risks, it follows, of course, that it is a maritime hypothecation, which, in legal contemplation, is neither more or less than a maritime mortgage."

The bond in question is printed in full in the report. A comparison with the mortgages and bonds here involved discloses no legal distinction.

In this case it was urged that the bond was invalid and the Court without jurisdiction because the moneys were not expended for the ship or the voyage. The claim was rejected; the court holding that if the bond was otherwise valid, the actual use of the moneys made no difference. The analogy is obvious.

In the case of *Conard v. The Atlantic Insurance Company of New York*, 1 Peters 386 (26 U. S.). A respondentia bond was involved and it was there urged that the bond was invalid because the ship had sailed before the bond was given and that the money was not appropriated to the purchase of the goods put on board. In disposing of the claims made this Court said:

> "In our opinion, neither of these objections can be sustained. It is not necessary, that a respondentia bond should be made before the departure

of the ship on the voyage, nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods, on which the risk is run. It matters not at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming, or fraud; if the advance be in good faith for a maritime premium; it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage."

Again, the analogy is obvious.

October 1st, 1934, Buffalo, New York.

Respectfully submitted,

RAY M. STANLEY,
ELLIS H. GIDLEY,
FERRIS D. STONE,
CLEVELAND THURBER,
Counsel for Petitioner,
Detroit Trust Company, Trustee.

SUBJECT INDEX.

	Page
Reference to Decision Below	1
Reasons for Opposition to Certiorari	2- 4
Additional Statement of Facts	4- 9
Argument—Merits	10-27
Prior to the Ship Mortgage Act it was settled law that a ship mortgage securing a personal loan to the shipowner was not, *ex proprio vigore,* foreclosable in admiralty—not because the Congress had not conferred such jurisdiction but because, under the Constitution as interpreted by this court, neither the loan, the primary contract, nor the mortgage, the incident thereof, was a maritime contract. The Congress has no power to extend admiralty jurisdiction to a nonmaritime contract	10-16
Maritime liens encumber commerce and are *stricti juris*	16
In any event the fact that the contracts involved were not wholly maritime would preclude original admiralty jurisdiction	16-17
Admiralty Courts are not courts of equity	17
The claim of unconstitutionality herein is deep rooted. The power of the Congress in connection with admiralty cannot transcend the jurisdiction delegated by the states to the Federal Government under the Constitution. The objection herein presents the serious question whether the legislative branch of the Federal Government has not encroached upon the reserved sovereign powers of the states.	

The attempted grant of admiralty jurisdiction herein would deprive the states of reserved jurisdiction over nonmaritime contracts because federal admiralty jurisdiction is exclusive. No state statute creating a maritime lien, justiciable in admiralty and thereby waiving reserved state rights, is involved. Subsection K, if applicable, is unconstitutional 18-22

The Congress cannot enlarge the grant of admiralty jurisdiction 19

Federal admiralty jurisdiction to enforce a lien is exclusive 19-20

A fair construction of the Ship Mortgage Act justified the holding that it does not apply to the particular mortgages involved. The act should be so construed 23-26

Conclusion 27

Table of Cases Cited.

Ada, The (C. C. A. 2), 250 Fed. 194..... 17

American Steamboat Co. v. Chace, 16 Wall. (83 U. S.) 522, 21 L. Ed. 369..... 20

Belfast, The, 7 Wall. (74 U. S.) 624, 19 L. Ed. 266 19

Bogart v. The Steamboat John Jay, 17 How. (58 U. S.) 399, 15 L. Ed. 95..... 11-13

Carpenter v. Longan, 16 Wall. (83 U. S.) 271, 21 L. Ed. 313 16

Crowell v. Benson, 285 U. S. 22, 55, 52 S. Ct. 285, 76 L. Ed. 598, 615.....19, 21, 23

Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239..... 23

Freights of the Kate, The, 63 Fed. 707, 720..... 15

General Smith, The, 4 Wheat. 438, 4 L. Ed. 609.... 20

Genesee Chief, The, 12 How. (53 U. S.) 443, 13 L. Ed. 1058 ..... 11, 18
Grant v. Poillon, 20 How. (61 U. S.) 162, 15 L. Ed. 871 16
Kalfarli, The (C. C. A. 2), 277 Fed. 391..... 16
Kellum v. Emerson, Fed. Cas. No. 7669..... 17
Krauss Bros. Lumber Co. v. Dimon S. S. Corp., Vol. 78 Adv. Op. page 91..... 16
Lincoln Land, The (D. C. Mass.), 295 Fed. 358..... 26
Lottawanna, The, 21 Wall. (88 U. S.) 558, 22 L. Ed. 654 .....14-15, 19
Meyer et al. v. Tupper, 66 U. S. (1 Black) 522, 17 L. Ed. 180 ..... 19, 21
Nanking, The (D. C. Cal.), 292 Fed. 642..... 26
New Jersey, Steam Navigation Co., The, v. The Merchants' Bank of Boston, 6 How. 344, 12 L. Ed. 465 11
Oconee, The (D. C. Va.), 280 Fed. 927..... 26
Panama R. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748..... 22, 23
People's Ferry Co., The, v. Beers, 20 How. (61 U. S.) 393, 15 L. Ed. 961.....13-14, 16, 18, 24
Perry v. Haines, 191 U. S. 17, 24 S. Ct. 8, 48 L. Ed. 73 20
Pillsbury Flour Mills Co. v. Interlake SS. Co. (C. C. A. 2), 40 F. (2d) 439 17
Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 3 S. Ct. 379, 27 L. Ed. 1038..... 21
Rea v. The Steamer Eclipse, 135 U. S. 599, 10 S. Ct. 873, 34 L. Ed. 269..... 16
Richard Winslow, The (C. C. A. 7), 71 Fed. 426.. 17
Roanoke, The, 189 U. S. 185, 23 S. Ct. 491, 47 L. Ed. 770 20
Roberts v. Atlantic Oil Producing Co. (C. C. A. 6), 295 Fed. 16, 19 25
Rumbell, The J. E., 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345 ..... 15, 20

Schuchardt v. Ship Angelique, 19 How. (60 U. S.) 239, 15 L. Ed. 625 13
Taylor, The Moses, v. Hammons, 4 Wall. (71 U. S.) 411, 18 L. Ed. 397 19
Winnebago, The (C. C. A. 6), 141 Fed. 945..... 20

Authorities.

Article III, Sections 1 and 2 U. S. Constitution.. 10
Judiciary Act of 1789, 28 U. S. C. A. § 41 (3)..... 10
Ship Mortgage Act, The (Sec. 30 of the Merchant Marine Act 1920), 46 U. S. C. A. § 861..... 23
Merchant Marine Act of 1920, Sec. 1, 46 U. S. C. A. § 861 23-24
Merchant Marine Act of 1920, Sec. 36, 46 U. S. C. A. § 887 25

In The

Supreme Court of the United States

October Term, 1933.

Nos. 909-910.

DETROIT TRUST COMPANY, TRUSTEE,

Petitioner,

v.

Steamer THOMAS BARLUM, Her Engines, etc.,
BARLUM STEAMSHIP COMPANY,

Respondent.

DETROIT TRUST COMPANY, TRUSTEE,

Petitioner,

v.

Steamer JOHN J. BARLUM, Her Engines, etc.,
BARLUM STEAMSHIP COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

(All Italics Supplied.)

The opinions delivered in the court below are now reported as *The Thomas Barlum, The John J. Barlum, 68 F. (2d) 946.*

This brief will be directed to the propositions that certiorari is not merited because:

The factual situations involved are so unusual as to be *sui generis.*

The decision below was clearly warranted.

Realizing that the facts presented were very exceptional and not typical of ship mortgage transactions, written argument in respondent's behalf in the court below was prefaced by the following statement:

> "It is not urged that the Ship Mortgage Act is unconstitutional in its entirety nor that Congress, having power to legislate concerning true maritime liens, could not *subordinate* certain of such liens to other, even common law, liens. It is not urged that a purchase money mortgage or a mortgage placed on a ship to raise funds for maritime purposes would be invalid or necessarily without the jurisdiction of the admiralty court. Such contentions are not necessary or pertinent herein. *What is urged is that these particular mortgages, by intendment of the parties and under the circumstances established by the record, were so devoid of connection with maritime purposes that the provisions of Subsection K of the Ship Mortgage Act, 46 U. S. C. A., § 951, conferring original foreclosure jurisdiction on the district court in admiralty, either does not, or cannot constitutionally, apply.*"

This restriction of the issues was clearly recognized by the Circuit Court of Appeals in the prevailing opinion [*68 F. (2d) 948-949*] as follows:

> "Appellant argues that these mortgages, as the record establishes, were so devoid of connection with maritime purposes and subjects, that the statute should not be construed to confer and cannot confer original jurisdiction of foreclosure in admiralty. * * *

"If it were established that these mortgages were given to support an issue of bonds 'to develop and encourage the maintenance of such a merchant marine' and therefore in accord with the objects of the Ship Mortgage Act, the admiralty jurisdiction to foreclose would be unquestionable. We need not decide whether or not a loan made for maritime purposes secured by a mortgage on a ship will become nonmaritime if the borrower, contrary to the agreement of the mortgage, diverts the money to nonmaritime purposes, nor need we consider what effect any estoppel in such a case would have. We are not called upon to say whether or not Congress could in any event extend the admiralty jurisdiction to a matter so closely related to transportation by navigable waters as to provide for the exclusive enforcement in admiralty of a mortgage on a ship actually engaged in such transportation. It is sufficient to point out here that the mortgagor and mortgagee both knew in advance of making these mortgages that the moneys advanced were not to be used for such purposes, but were intended for and actually were used for nonmaritime purposes. This was fully disclosed at the trial. * * *

"* * * Nowhere in the Merchant Marine Act or the Ship Mortgage Act is it anywhere shown that Congress intended that ship mortgages given by owners to support outside operations such as real estate ventures or to pay past debts not arising in maritime transactions were in contemplation. Mortgage loans of this character are foreign to the idea of maritime operations. The mortgages in question having been shown to be nonmaritime in intent and character, the admiralty court did not have jurisdiction, and the application to dismiss the suit should have been granted."

The minority opinion erroneously assumes and states that respondent contended that the Congress could not confer the status of a *preferred mortgage* upon any other than a true maritime mortgage. Respondent made no

such contention. Respondent did contend that there was a distinction between a preferred *mortgage* lien and a *maritime* lien and between the congressional power to confer preference right upon a nonmaritime mortgage by subordination of maritime liens thereto and the power by fiat to *convert a nonmaritime* lien into a *maritime* lien and make it, *per se*, the subject of *original* admiralty jurisdiction.

The minority opinion also assumes that unless original foreclosure jurisdiction under Subsection K of the Ship Mortgage Act is upheld herein the power of the Congress to give a mortgage preference in distributions is necessarily destroyed. *That problem is not involved in this record.*

The unusual facts referred to require additional statement.

ADDITIONAL STATEMENT OF FACTS.

Respondent, Barlum Steamship Company, claimant below, is a West Virginia corporation with principal office at Detroit, Michigan. At the times involved it was, and still is, owner of two steel steamers plying the Great Lakes known as the "Thomas Barlum" and "John J. Barlum" (R. 9, 29, 63, 82). John J. Barlum was president and Thomas Barlum was secretary of the company (R. 51, 99). In 1927 and 1928 its 3200 shares were held by 14 stockholders, John J. Barlum holding 2561 shares. In 1929 it had 11 stockholders, John J. Barlum holding 2651 shares (R. 197-199, 250). As a matter of convenience the company maintained separate bank accounts for the steamers and in separate banks (R. 171, 191).

John J. Barlum was connected with several enterprises. *Detroit Trust Co. for years had done business with Mr. Barlum and certain of these enterprises* (R. 133). *"Barlum Land Co."* was an assumed name used by Mr. Barlum in connection with certain of his individual fee and leasehold real estate holdings, including those known as Lawyers Building, Dixie Land and Lewis Hotels. In 1925 Mr. Barlum and wife executed a $1,250,000 bond issue mortgage to Detroit Trust Co. as Trustee covering these properties and thereafter conveyed them to *"Barlum Land & Improvement Co.,"* a Michigan corporation, in exchange for its entire capital stock (R. 157, 170, 201-202, 210). *"Barlum Realty Co."* is a Michigan corporation owning a forty-story Detroit office building, in which corporation John J., Thomas J. and Louis Barlum, proportions not shown, owned the entire capital stock (R. 171, 210). *"Cadillac Square & Improvement Co."* is a limited partnership association which built, owns and operates a twenty-story hotel known as Barlum Hotel, Detroit (R. 186). The stock in the association is owned by the three Barlum brothers, William B. Thompson and his two sons, and three sisters of the Barlums—neither the Thompsons nor the sisters having any interest in the steamship company (R. 210). *"Thomas Barlum & Sons Co."* was a Michigan corporation engaged in the meat packing business in Detroit. Its stock was owned by John J., Thomas J. and Louis P. Barlum. John was manager and head (R. 200, 206-207). It had made extensive loans from Detroit Trust Co. (R. 200). *The steamship company had no interest in the stock or assets of Barlum Land Co.* (R. 202), *Barlum Land & Improvement Co.* (R. 184-203), *Barlum Realty Co.* (R. 203), *Cadillac Square & Improvement Co.* (R. 187, 203), *or Thomas Barlum & Sons Co.* (R. 210), *nor did any of these have any interest in the steamship company* (R. 202-203).

Prior to the making of either mortgage under foreclosure herein respondent had executed to petitioner a $100,000 mortgage on the "Thomas Barlum" dated December 1, 1924 (R. 133, 135, 144), paid down to $50,000 and refunded by a similar mortgage for $75,000, dated February 15, 1927 (R. 141, 171, 223-225). The mortgage of December 1, 1924, was intended to, and did, secure a loan by petitioner to respondent to pay a tax claim which the Government was asserting against respondent (R. 136, 169-170, 199, 201, 221-222).

$200,000 "Thomas Barlum" mortgage, March 1, 1929: *This is the mortgage foreclosed by the decree of the district court herein in suit No. 1794.* By February, 1929, the $75,000 mortgage had been reduced to $50,000. Negotiations were had with the trust company for an increased loan (R. 146). On February 21, 1929, the trust company, per Mr. Butler, vice-president, wrote respondent (Exhibit 7; R. 227-230, 146-147) offering to purchase, at 97%, $200,000 of bonds secured by mortgage on the "Thomas" guaranteed by John J. Barlum, documents to be prepared by the trust company's attorneys, and (R. 228) stating:

> *"It is understood that as a condition of the above the proceeds of the purchase of said bonds by us are to be used as follows:*
>
> | | |
> |---|---|
> | To pay the note issue now outstanding secured by mortgage on the same steamer | $50,000.00 |
> | Interest on the same from February 15th to which it is now paid up to March 1st, 1929 | 125.00 |
> | Annual fee due the trustee | 25.00 |
> | Closing fee due the trustee | 25.00 |
> | Attorneys' charges estimated | 750.00 |
> | Trustee's fee for certifying new bonds | 200.00 |
> | Cost of printing new bonds estimated | 100.00 |
> | *To take up principal debt of John J. Barlum and Thomas Barlum & Sons now held by us to the amount of* | 100,000.00 |

Balance to Steamship Company for repairs and refitting the steamers "Thomas Barlum" and "John J. Barlum" for the season of 1929 ..... 42,775.00"

The $100,000 debt of Mr. Barlum and Thomas Barlum & Sons was for collateral loans long previously made to them respectively by the trust company and had no relation to respondent. Mr. Butler was fully informed as to the details of such debt (R. 147, 151-153, 162-164) *and it was contemplated that the debt should be paid as indicated* (R. 204).

The mortgage, prepared by the trust company's attorneys (R. 213), dated as of March 1, 1929, was executed and delivered about March 22, 1929, while the boat was laid up. Exhibit A attached to libel (R. 17-60) is a copy of the mortgage.

The application to the Securities Commission (prepared by the trust company) relating to this $200,000 mortgage, stated the purpose of the issue was to "refinance" (R. 150; Exhibit 9, R. 234). As shown by the trust company's statement (Exhibit 8; R. 231-232), it withheld from the proceeds of the issue $50,358.33 to take up the balance of the previous mortgage, $1545.23 for trustee and attorney fees, printing, recording, etc., and:

"Amount required to take up Thomas Barlum & Sons note, being principal and interest		$45,510.00
Amount necessary to take up John J. Barlum note, being principal and interest		33,566.50
Amount to apply on account of principal of John J. Barlum note	$20,745.50	
Accrued int. to March 25th..	178.00	20,923.50
Balance to Barlum Steamship Company		42,896.44"

Respondent deposited the $42,896.44 in bank account "Steamer John J. Barlum" at National Bank of Commerce and paid therewith about $22,000 of accounts relating to the *"John J."* and transferred $20,000 of the balance to the bank account "Steamer Thomas Barlum" at the American State Bank and out of which were paid running accounts allocated to the "Thomas" on account of its previous season's operations (R. 178-183; Exhibit 19, R. 246-249).

$200,000 "John J. Barlum" mortgage, December 15, 1927: *This is the mortgage foreclosed by the decree of the district court herein in suit No. 1795.* Exhibit 13 (R. 235-236, 155) is the accepted written offer by the trust company to respondent dated December 23, 1927, to purchase an issue of $200,000 of respondent's bonds on the "John J." at 98, to be guaranteed by John J. Barlum, documents to be satisfactory to trust company's attorneys. The mortgage, dated as of December 15, 1927 (Exhibit A to libel, R. 71-114), prepared by the trust company's attorneys (R. 213) was executed about January 5, 1928, while the boat was laid up. *The understanding was that $82,281.25 was to be withheld by the trust company to pay $50,000 principal and $32,281.25 interest on the $1,250,000 bond issue mortgage executed by John J. Barlum and wife to the trust company on the individual real estate and leaseholds of Mr. and Mrs. Barlum as aforesaid and also that $10,000 was to be retained by the trust company and applied on an individual note executed by Mr. Barlum to the trust company dated August 11, 1927, evidencing a personal loan made to Mr. Barlum by the trust company* (Exhibit 15, R. 238, 239; Exhibit 15-A, R. 240, 156-158, 205). *Respondent had no connection with such items for which said sums were to be withheld.* Such items, together with certain trustee and attorney fees and expenses, were withheld according

to the understanding. The remainder of the proceeds of the loan was deposited in the bank account of the *"Thomas"* and used as follows: Paid to engineer of the *"Thomas"* for past season services $500; loan to *Thomas Barlum & Sons Co.* $4000; loan to *Cadillac Square Improvement Co.* $52,500; loan to *Barlum Realty Co.* $18,600; loan to *John J. Barlum personally* $5500 (used by him in paying an individual note held by the Romeo Savings Bank); loan to *Lewis Hotel* $19,000 (being one of the properties covered by the $1,250,000 mortgage given by John J. Barlum and wife to the trust company); paid to the captain of the "John J." $500 for services in connection with that steamer and $2000 was transferred to the "Steamer John J. Barlum" account (R. 183-189). *Out of the entire proceeds of the issue only the $500 paid to the master of the "John J." and the $2000 transferred to its account had any connection with the "John J."* (R. 188).

Remedy provided in mortgages: *The sole remedy for foreclosure stipulated in the mortgages is by seizure and sale "WITHOUT" process of any kind* (R. 36-38, 89-91).

Cases so atypical as these do not merit the coveted review nor justify the broad assertions made by petitioner as to the harmful effect of the decision below. No similar case appears to have been presented to the courts in the fourteen years the Ship Mortgage Act has been in effect. It is respectfully submitted that the review sought should await a record in which the questions raised by petitioner were squarely involved or decided.

ARGUMENT—MERITS.

MORTGAGE NONMARITIME.

Prior to the Ship Mortgage Act it was settled law that a ship mortgage securing a personal loan to the shipowner was not, ex proprio vigore, foreclosable in admiralty—not because the Congress had not conferred such jurisdiction but because, under the Constitution as interpreted by this court, neither the loan, the primary contract, nor the mortgage, the incident thereof, was a maritime contract. The Congress has no power to extend admiralty jurisdiction to a nonmaritime contract.

Article III of the Constitution provides:

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *."
>
> "Section 2. The judicial Power shall extend * * * to all Cases of admiralty and maritime jurisdiction; * * *."

Perforce Section 1, supra, the Congress, by the Judiciary Act of 1789, conferred upon the district courts original jurisdiction:

> "Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it * * *." *28 U. S. C. A. § 41 (3). Vide, Part 2 Constitution, U. S. C. A. n. 152.*

This court early dispelled the idea that the admiralty jurisdiction thus conferred upon the federal courts was

the circumscribed power of the English admiral at the time of the adoption of the Constitution.

> *The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston (1848), 6 How. 344, 12 L. Ed. 465.*

That this court was fully conscious of the desirability of making federal admiralty jurisdiction as comprehensive as the needs of navigation, is attested by the above case as well and by the decision of *The Genesee Chief (1851), 12 How. (53 U. S.) 443, 13 L. Ed. 1058,* holding that the admiralty jurisdiction was not limited to tide waters. Certainly this court accorded the constitutional provisions a broad, rather than a restricted, interpretation and in view of such a tendency this court's refusal to uphold jurisdiction over ship mortgages is of great significance.

Bogart v. The Steamboat John Jay (1854), 17 How. (58 U. S.) 399, 15 L. Ed. 95: Libelants had sold the steamer to McMurray, taking a purchase money mortgage for part of the sale price. Upon default in payment of the mortgage note libelants filed libel against the steamer.

> "To this libel George Logan, by way of answer, put in a claim of ownership of The John Jay, by a *bona fide* purchase from McMurray; and he further denies the jurisdiction of the court, upon ground that the contract between the libelants and McMurray was not maritime, or a case of admiralty and maritime jurisdiction * * *.
>
> "Upon the hearing of the cause in the district court, the libel was dismissed * * *. We think that the affirmance of the judgment of the district court was right, and will here briefly give our reasons for that opinion.

"It has been repeatedly decided in the admiralty and common law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States. No case can be found in either country where it has been done. In the case of *The Neptune, 3 Hagg., Adm. Rep. 132,* Sir John Nicholl, in giving his judgment, observes: 'Now, upon questions of mortgage, the Court of Admiralty has no jurisdiction, whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a chattel personal, whether he is the legal or only the equitable owner, and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is passed, *the decision of these questions belongs to other courts; they are not within the jurisdiction or province of the courts of admiralty,* which never decide on questions of property between the mortgagee and owner.'

"This is not so, because such a jurisdiction had been denied by the jealousy of the courts of the common law. Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. It is a security to make the performance of the mortgagor's undertaking more certain; and whilst he continues in possession of the ship, disconnecting the mortgagee from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account. *Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. In such a case, the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose. There cannot be, then, anything maritime in it. A failure to perform such a contract cannot make it maritime."*

There was no dissent from this opinion and seven of the justices who participated in the decision of The Genesee Chief in 1851 were still members of this court.

Schuchardt v. Ship Angelique (1856), 19 How. (60 U. S.) 239, 15 L. Ed. 625.

Mortgagees filed *libel* in the district court against the proceeds of a ship sold under decrees entered upon other libels based on maritime liens. The court dismissed the mortgagee's libel, saying:

"The libel filed in this case is a libel simply to foreclose a mortgage, or to enforce the payment of a mortgage, and the proceeding cannot therefore be upheld within the case of Bogart v. The John Jay, heretofore decided by this court (17 How.) 58 U. S. 399.

*"The proper course for the mortgagees was to have appeared as claimants to the libels filed against the vessel, in which the questions presented in the case might have been raised and considered * * *.*

The People's Ferry Co. v. Beers (1858), 20 How. (61 U. S.) 393, 15 L. Ed. 961.

Libel against a new ferry boat for balance due the builders for its construction under a contract reserving a lien to secure payment. The district court upheld admiralty jurisdiction. In reversal, this court said:

"The lien reserved by the contract, is not set up in the libel, *nor can it avail, as it amounted to nothing more than a mortgage on the vessel for a debt* * * *.

"The question presented involves a contest between the State and Federal Governments. The latter has no power or jurisdiction beyond what the Constitution confers; * * *. The extent of power withdrawn from the States, and vested in the*

General Government, depends on a proper construction of the constitutional provision above cited. Its terms are indefinite, and its true limits can only be ascertained by reference to what cases were cognizable in the maritime courts when the Constitution was formed—for what was meant by it then, it must mean now; what was reserved to the States, to be regulated by their own institutions, cannot be rightfully infringed by the General Government, either through its Legislative or Judiciary Department. The contest here is not so much between rival tribunals, as between district sovereignties, claiming to exercise power over contracts, property, and personal franchises * * *.

"*The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation* * * *.

"*In considering the foregoing description, it must be borne in mind that liens on vessels encumber commerce, and are discouraged;* so that where the owner is present, no lien is acquired by the materialman; nor is any, where the vessel is supplied or repaired in the home port * * *. So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), *it was a contract made on land, to be performed on land.* The wages of the shipwrights had no reference to a voyage to be performed; they had no interest or concern whatever in the vessel

had no interest or concern whatever in the vessel

after she was delivered to the party for whom she was built; they were bound to rely on their contract * * *."

The Lottawanna (1874), 21 Wall. (88 U. S.), 558, 22 L. Ed. 654:

"*In this case the appellants themselves have no maritime lien, but merely a mortgage to secure an ordinary debt not founded on a maritime contract. They,*

therefore, have no standing in court, except under the 43rd Admiralty Rule, and in the manner above indicated."

The J. E. Rumbell (1892), 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345:

> *"An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it or to assert either title or right of possession under it* * * *. But it has jurisdiction, after a vessel has been sold by its order and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the materialmen in this case * * *.
>
> *"The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien,* * * *."

The Freights of the Kate (D. C. N. Y.), 63 Fed. 707, 720, in which Mr. Justice Brown said:

> "A letter of credit, like a loan of money, is in itself indifferent in character; it may be maritime, or nonmaritime, according to the objects of the loan, the intent of the parties, and the circumstances attending it. Maritime contracts are contracts that pertain to maritime commerce and navigation. A letter of credit issued for the purpose of directly aiding the prosecution of current voyages, and upon the faith of the freights to be earned, as a part of the contract, is as purely maritime as a bottomry bond; and no commercial transactions are more characteristically maritime than these."

A note is the primary obligation to which a mortgage securing it is merely an incident.

Carpenter v. Longan, 16 Wall. (83 U. S.) 271, 21 L. Ed. 313.

The foregoing decisions clearly state the factors which render a loan and ship mortgage nonmaritime in character. The loans herein were merely *personal* contracts in no way involving navigation or the perils of the sea. The mortgages were merely *security* for performance of the personal contract and in no way involved the use of the steamers in navigation.

MARITIME LIENS ENCUMBER COMMERCE AND ARE *STRICTI JURIS.*

Krauss Bros. Lumber Co. v. Dimon S. S. Corp., Vol. 78 Adv. Op. page 91;
The Kalfarli (C. C. A. 2), 277 Fed. 391;
The People's Ferry Co. v. Beers, infra, page 13.

IN ANY EVENT THE FACT THAT THE CONTRACTS INVOLVED WERE NOT WHOLLY MARITIME WOULD PRECLUDE ORIGINAL ADMIRALTY JURISDICTION.

Grant v. Poillon, 20 How. (61 U. S.) 162, 15 L. Ed. 871:

> "The jurisdiction of courts of admiralty is limited, in matters of contract, to those, *and to those only*, which are maritime."

Accord: *Rea v. The Steamer Eclipse, 135 U. S. 599, 10 S. Ct. 873, 34 L. Ed. 269.*

Pillsbury Flour Mills Co. v. Interlake SS. Co. (C. C. A. 2), 40 F. (2d) 439, certiorari denied in *282 U. S. 845, 51 S. C. 24, 75 L. Ed. 750:* Libel for damage to wheat shipped under contract for transportation from Milwaukee to Buffalo and winter storage at destination. In denying admiralty jurisdiction the court said:

> "'A contract to be "wholly maritime," means that the principal subject matter of agreement gives character to the whole.' * * *. After reviewing the cases, we concluded that contract rights are maritime and within the admiralty jurisdiction when they relate to the ship as an instrument of commerce, and pointed out that a contract for the wharfage of a ship withdrawn from commerce is not maritime and will not support a maritime lien."

The Richard Winslow (C. C. A. 7), 71 Fed. 426:

> *"A maritime contract must therefore concern transportation by sea. It must relate to navigation, and to maritime employment. It must be one of navigation and commerce on navigable waters.* Unquestionably there was here a contract for carriage by sea, and that contract was maritime in its nature. *But there was joined with it a contract with respect to the cargo after the completion of the voyage that was in no respect maritime in its nature* * * *."

ADMIRALTY COURTS ARE NOT COURTS OF EQUITY.

The Ada (C. C. A. 2), 250 Fed. 194;
Kellum v. Emerson, Fed. Cas. No. 7669.

CONGRESS—LACK OF POWER.

THE CLAIM OF UNCONSTITUTIONALITY HEREIN IS DEEP ROOTED. THE POWER OF THE CONGRESS IN CONNECTION WITH ADMIRALTY CANNOT TRANSCEND THE JURISDICTION DELEGATED BY THE STATES TO THE FEDERAL GOVERNMENT UNDER THE CONSTITUTION. THE OBJECTION HEREIN PRESENTS THE SERIOUS QUESTION WHETHER THE LEGISLATIVE BRANCH OF THE FEDERAL GOVERNMENT HAS NOT ENCROACHED UPON THE RESERVED SOVEREIGN POWERS OF THE STATES. THE ATTEMPTED GRANT OF ADMIRALTY JURISDICTION HEREIN WOULD DEPRIVE THE STATES OF RESERVED JURISDICTION OVER NONMARITIME CONTRACTS BECAUSE FEDERAL ADMIRALTY JURISDICTION IS EXCLUSIVE. NO STATE STATUTE CREATING A MARITIME LIEN, JUSTICIABLE IN ADMIRALTY AND THEREBY WAIVING RESERVED STATE RIGHTS, IS INVOLVED. SUBSECTION K, IF APPLICABLE, IS UNCONSTITUTIONAL.

Vide, *The People's Ferry Co. v. Beers, infra, page 13,* and *The Genesee Chief, infra, page 11.*

No interstate commerce is involved in the present controversy. It is significant that in Article I, Section 8 of the Constitution, defining the power of the Congress, the subject of admiralty is not mentioned. The connection of the Congress with that subject is through Article III, Section 1 which permits the Congress to *apportion the judicial power conferred by the states but which cannot sustain an arrogated increase of power.*

Crowell v. Benson, 285 U. S. 22, 55, 52 S. Ct. 285, 76 L. Ed. 598, 615, upholding The Longshoremen's and Harbor Workers' Act providing compensation to workmen for injuries occurring *upon navigable waters.* This court, by Mr. Chief Justice Hughes, said:

> *"These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§ 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.*
>
> *"In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction * * *. Again, it cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations * * *."*

The Congress cannot enlarge the grant of admiralty jurisdiction.

> *Meyer et al. v. Tupper (1861), 66 U. S. (1 Black) 522, 17 L. Ed. 180;*
>
> *The Lottawanna (1874), 88 U. S. (21 Wall.) 588, 22 L. Ed. 654.*

Federal admiralty jurisdiction to enforce a lien is exclusive.

> *The Moses Taylor v. Hammons, 4 Wall. (71 U. S.) 411, 18 L. Ed. 397;*
>
> *The Belfast, 7 Wall. (74 U. S.) 624, 19 L. Ed. 266;*

American Steamboat Co. v. Chace, 16 Wall. (83 U. S.) 522, 21 L. Ed. 369;
The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345;
The Roanoke, 189 U. S. 185, 23 S. Ct. 491, 47 L. Ed. 770;
Perry v. Haines, 191 U. S. 17, 24 S. Ct. 8, 48 L. Ed. 73;
The Winnebago (C. C. A. 6), 141 Fed. 945, certiorari denied, 200 U. S. 616.

Subsection K of the Ship Mortgage Act expressly provides that jurisdiction thereunder shall be exclusive.

Prior to the Ship Mortgage Act an ordinary ship mortgage securing a general loan to the ship owner was a local matter and, as such, was within the jurisdiction of the state courts both as to actions *in personam* and *in rem*. If the Congress, by its fiat, can convert such a mortgage into a maritime lien, the jurisdiction of the state is automatically divested. This, it is respectfully contended, cannot be done without the states approval or amendment of the Constitution.

The Congress may prescribe forms, mode and rules of judicial proceedings within the defined admiralty jurisdiction of the courts but cannot make maritime a non-maritime cause or transaction. Within such confines only can it be said that the Congress may amend the admiralty law. Analysis will disclose no decision upholding congressional regulation except as to a matter unquestionably maritime. For example:

In *The General Smith, 4 Wheat. 438, 4 L. Ed. 609,* this court drew the sharp distinction between "process" and "jurisdiction" saying that the creation by local law of a lien enforceable *in rem* in admiralty for ship supplies

was merely to supply a *process* in connection with *existent* maritime jurisdiction *because the contract for supplies was in itself maritime and within the established jurisdiction of the admiralty court to proceed in personam.* Nothing more than *a mode of procedure was involved.*

In *Meyer et al. v. Tupper et al., infra, page 19,* the same view was taken as to *Admiralty Rule 12* recognizing such liens.

In *Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 3 S. Ct. 379, 27 L. Ed. 1038, this court said:*

> "The rule of *limited liability* prescribed by the Act of 1851 is nothing more than the old maritime *rule* administered in courts of admiralty in all countries except England from time immemorial; and if this were not so, the subject matter itself is one that belongs to the department of martime law."

The underlying cause of action involved was unquestionably maritime and over which the admiralty court had jurisdiction. *The act of Congress merely controlled the procedure relating to the enforcement of that jurisdiction and, in our opinion, did no more than alter a rule of recoverable damages in such cases.* The same is true of *Richardson v. Harmon* on which petitioner relies, wherein the underlying cause of action was the liability of a ship which, in its navigation, damaged a bridge.

In *Crowell v. Benson, infra, page 19,* the claims to which the Act applied were within the admiralty jurisdiction. This court therein specifically repudiated the idea that the Congress could create a maritime *cause of action* where none previously existed and denied that the Congress could even substitute findings for ultimate court decision as to the existence of *jurisdictional* facts.

Panama R. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748, upheld the Jones Act on the theory that it did not create a maritime cause of action but merely regulated procedure.

To create a lien in connection with a matter already subject to maritime jurisdiction is one thing—*but to attempt thereby to create jurisdiction where none existed is another.* That the existence of a lien merely has not been an accepted basis of our admiralty jurisdiction is also attested by the fact that under the civil law many liens against ships existed but such liens were not enforceable in original proceedings *in rem* under our law because, notwithstanding the existence of such liens, the underlying cause of action was, by our courts, held to be nonmaritime.

The states have not voluntarily yielded their control over nonmaritime mortgages and until they do, it is respectfully submitted, the Congress cannot arbitrarily force them to do so by conferring exclusive jurisdiction thereover upon the federal courts. Subsection K is unconstitutional, if it is applicable.

APPLICABILITY OF SUBSECTION K, SHIP MORTGAGE ACT.

A FAIR CONSTRUCTION OF THE SHIP MORTGAGE ACT JUSTIFIED THE HOLDING THAT IT DOES NOT APPLY TO THE PARTICULAR MORTGAGES INVOLVED. THE ACT SHOULD BE SO CONSTRUED.

Crowell v. Benson, infra, page 19:

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that such a construction is permissible and should be adopted in the instant case."

Accord: *Panama R. R. Company v. Johnson, 264 U. S. 375, 44 S. C. 391, 68 L. Ed. 748.*

Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239:

> "A statute may be invalid as applied to one state of facts, and yet be valid as applied to another."

The Ship Mortgage Act is also known as Section 30 of the Merchant Marine Act 1920. *Vide* historical notes to 46 U. S. C. A., § 861 and § 911.

Appellee argues that the decision below will defeat the desired and necessary results which the Merchant Marine Act was designed to accomplish.

Section 1 of the Merchant Marine Act, 1920, 46 U. S. C. A., § 861, reads:

> "It is necessary for the national defense and for

the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, insofar as may not be inconsistent with the express provisions of this chapter, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained."

We can easily perceive that the Congress might have power to extend admiralty jurisdiction to matters *directly connected with maritime operations* and that it might be contended successfully that a ship construction or purchase money mortgage, executed as an incident to placing, continuing or maintaining the ship in operation and navigation, is a proper subject for federal legislation, *but the Ship Mortgage Act and the Merchant Marine Act may be searched in vain for any indication that ship mortgages given by shipowners for construction and operation of office buildings and hotels and payment of real estate bonds and personal obligations of others, would so contribute to the purposes of the acts as to be within their contemplation. Such mortgages are not only foreign, but in fact opposed, to the true intent and purpose of the acts.* That such a conclusion is not without judicial support is evident from the following statement in *Peoples Ferry Co. v. Beers, infra, page 13:*

"* * * it must be borne in mind that liens on

vessels encumber commerce and are discouraged; * * *."

That the liens against The Thomas and The John J. have encumbered commerce is attested by their consequent enforced idleness since May, 1921.

Section 36 of the Merchant Marine Act, 46 U. S. C. A., § 887, provides:

> "If any provision of this and the following chapter is declared unconstitutional *or the application of any provision to certain circumstances be held invalid,* the remainder of such chapters and the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby."

The "following chapter" referred to is the Ship Mortgage Act.

Even in the absence of such a saving clause the courts have generally held that partial invalidity does not necessarily require holding an entire act unconstitutional. For federal cases making elision and enforcing remainder see list appended to the decision in *Roberts v. Atlantic Oil Producing Co. (C. C. A. 6), 295 Fed. 16, 19.*

It is quite significant that the Congress in Subsection K of the Ship Mortgage Act did not attempt to say that a preferred mortgage created by the act was to be a *"maritime lien"* but merely provided that such be a *"preferred mortgage lien."* It is submitted the act should not have been accorded an unconstitutional purpose but was properly held inapplicable to the mortgages herein. The act, even if inapplicable to the instant mortgages can nevertheless be applicable to all maritime mortgages

and even as to nonmaritime mortgages may possibly have the lawful effect of establishing the basis of priority as against true maritime liens.

On page 9 of petitioner's brief counsel cite:

> *The Oconee (D. C. Va., 1922), 280 Fed. 927;*
> *The Nanking (D. C. Cal., 1923), 292 Fed. 642;*
> *The Lincoln Land (D. C. Mass., 1923), 295 Fed. 358.*

In the case of *The Oconee* the court had acquired original jurisdiction under a maritime lien for supplies. The United States filed an *intervening* petition claiming priority payment under a preferred mortgage. It was contended that the *whole* Ship Mortgage Act was unconstitutional. No question of jurisdiction was involved as the court had properly acquired jurisdiction over the res.

In the case of *The Nanking* the initiatory libel apparently was for enforcement of a true maritime lien followed by intervening libel by the mortgagee, to which libel exceptions based on claimed unconstitutionality of the Act were overruled.

In the case of *The Lincoln Land* the mortgagee apparently filed the libel, and, so far as the report indicates, a sale occurred before any attack was made on the validity or extent of the mortgage. Intervening libels based on maritime liens for supplies and lighterage were filed and such claimants denied the priority of the mortgage over their claims.

The three cases, as well as those in which constitutionality was assumed, are not in point and present no conflict with the decision of the Court of Appeals herein.

CONCLUSION.

It is respectfully asked that the petition for writ of certiorari be denied.

Respectfully submitted,

GEORGE E. BRAND,
THOMAS C. BURKE,
CHARLES S. DESMOND,
Counsel for Respondent.

April 19, 1934.

FILE COPY

In The

Supreme Court of the United States

October Term, 1934.

No. 13.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

v.

STEAMER "THOMAS BARLUM," Her Engines, Etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

No. 14.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

v.

STEAMER "JOHN J. BARLUM," Her Engines, Etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

RESPONDENT'S BRIEF.

GEORGE M. BRAND,
THOMAS C. BURKE,
HARRY S. DENNISON,
Counsel for Respondent.

SUBJECT INDEX.

	Page
OPINIONS BELOW	2
STATEMENT OF THE CASES	2- 4
STATEMENT OF SCOPE OF CONTENTIONS	4- 6
STATEMENT OF FACTS	7-15
Respondent corporation	7
Other enterprises	7- 8
Prior mortgages	8-10
$200,000 mortgage "Thomas"	10-13
$200,000 mortgage "John J."	13-14
Defaults	14-15
Remedy provided in mortgages	15
STATEMENT OF POINTS OF LAW	16
I. MORTGAGE NONMARITIME: Prior to the Ship Mortgage Act it was settled law that a ship mortgage securing a personal loan to the shipowner was not, ex proprio vigore, foreclosable in admiralty—not because the Congress had not conferred such jurisdiction—but because, under the Constitution as interpreted by this court, neither the loan, the primary contract, nor the mortgage, the incident thereof, was a maritime contract. The Congress has no power to extend original admiralty jurisdiction to a nonmaritime contract	17
The bonds are the primary obligations to which the mortgages are mere incidents	23
Maritime liens encumber commerce and are stricti juris	23

The fact that the contracts involved were not wholly maritime would preclude original admiralty jurisdiction 24

Admiralty courts are not courts of equity 25

II. CONGRESS—LACK OF POWER: The power of the Congress in connection with admiralty cannot transcend the jurisdiction delegated by the states to the Federal Government under the Constitution. The objection herein presents the serious question whether the legislative branch of the Federal Government has not encroached upon the reserved sovereign powers of the states. The attempted grant of admiralty jurisdiction, if applicable to the mortgages herein, would deprive the states of reserved jurisdiction over nonmaritime contracts because federal admiralty jurisdiction is exclusive. No state statute creating a maritime lien, justiciable in admiralty and thereby waiving reserved state rights, is involved. Subsection K, if applicable, is unconstitutional 26

The Congress cannot enlarge the grant of admiralty jurisdiction 27

Federal admiralty jurisdiction to enforce a lien is exclusive. Subsection K of the Ship Mortgage Act expressly provides that jurisdiction thereunder shall be exclusive.. 28

The Congress may prescribe forms, mode and rules of judicial proceedings within the defined admiralty jurisdiction of the courts but cannot make maritime a nonmaritime cause or transaction. Within such confines only can it be said that the Congress may

amend the admiralty law. Analysis will disclose no decision upholding congressional regulation except as to a matter unquestionably maritime 37

III. APPLICABILITY OF SUBSECTION K, SHIP MORTGAGE ACT. A fair construction of the Ship Mortgage Act justified the holding that it does not apply to the particular mortgages involved. The act should be so construed 40

IV. ESSENTIAL JURISDICTION CANNOT BE CONFERRED BY CONSENT OR ESTOPPEL 43

CONCLUSION 45

Table of Cases Cited.

Cases.

Ada, The, 250 Fed. 194 25

American Steamboat Co. v. Chace, 16 Wall. (83 U. S.) 522, 21 L. Ed. 369 36

Belfast, The, 7 Wall. (74 U. S.) 624, 19 L. Ed. 266 32

Bogart v. The Steamboat John Jay, 17 How. (58 U. S.) 399, 15 L. Ed. 95..... 18, 25

Carpenter v. Longan, 16 Wall. (83 U. S.) 271, 21 L. Ed. 313 23

Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171..... 32

Crowell v. Benson, 285 U. S. 22, 55, 52 S. Ct. 285, 76 L. Ed. 598, 615 .....27, 38, 40

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239..... 40

Detroit Trust Co., Trustee, v. Barlum S. S. Co. 56 F. (2d) 455, 2 F. Supp. 733, 68 F. (2d) 946 2

El Oriente, 5 F. (2d) 251 25
Freights of the Kate, The, 63 Fed. 707, 720..... 22
General Smith, The, 4 Wheat. 438, 4 L. Ed. 609... 37
Genesee Chief, The, 12 How. (53 U. S.) 443, 13 L. Ed. 1058 18
Grant v. Poillon, 20 How. (61 U. S.) 162, 15 L. Ed. 871 24
Grant-Smith-Porter Co. v. Rohda, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008.. 21
Kalfarli, The, 277 Fed. 391 23
Kellum v. Emerson, Fed. Cas. No. 7669..... 25
Krauss Bros. Lumber Co. v. Dimon S. S. Corp., Vol. 78 Adv. Op. p. 91..... 23
Leon v. Galceran, 11 Wall. (78 U. S.) 185, 20 L. Ed. 74 32
Lincoln Land, The, 295 Fed. 358 44
Lottawanna, The, 21 Wall. (88 U. S.) 558, 22 L. Ed. 654 ..... 21, 27
Meyer et al. v. Tupper, 1 Black (66 U. S.) 522, 17 L. Ed. 180 ..... 27, 37
Milwaukee, The, 15 F. (2d) 886..... 25
Moses Taylor, The, v. Hammons, 4 Wall. (71 U. S.) 411, 18 L. Ed. 397 31
Nanking, The, 292 Fed. 642..... 44
New England Marine Ins. Co. v. Dunham, 11 Wall. (78 U. S.) 1, 20 L. Ed. 90..... 26
New Jersey Steam Navigation Company, The, v. The Merchants' Bank of Boston, 6 How. 344, 12 L. Ed. 465 18
Norton v. Switzer, 3 Otto (93 U. S.) 355, 23 L. Ed. 903 33
Oconee, The, 280 Fed. 927 44
Panama R. R. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748..... 38, 40
People's Ferry Co., The, v. Beers, 20 How. 393, 15 L. Ed. 961 .....20, 23, 25, 26, 42

Perry v. Haines, 191 U. S. 17, 24 S. Ct. 8, 48 L. Ed. 73 36
Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 41 S. Ct. 1, 65 L. Ed. 97 ..... 23, 24
Pillsbury Flour Mills Co. v. Interlake S. S. Co., 40 F. (2d) 439, aff'g 36 F. (2d) 390, cert. denied 282 U. S. 845, 51 S. Ct. 24, 75 L. Ed. 750..... 24
Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 3 S. Ct. 379, 27 L. Ed. 1038..... 38
Rea v. The Steamer Eclipse, 135 U. S. 599, 10 S. Ct. 873, 34 L. Ed. 269 25
Richard Winslow, The, 71 Fed. 426 24
Richardson v. Harmon, 222 U. S. 96, 32 S. Ct. 27, 56 L. Ed. 110 38
Roanoke, The, 189 U. S. 185, 23 S. Ct. 491, 47 L. Ed. 770 35
Roberts v. Atlantic Oil Producing Co., 295 Fed. 16, 19 43
Rumbell, The J. E., 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345 ..... 22, 34
Schuchardt v. Ship Angelique, 19 How. (60 U. S.) 239, 15 L. Ed. 625 20
Thames Towboat Co. v. The Schooner Francis McDonald, 254 U. S. 242, 41 S. Ct. 65, 65 L. Ed. 245 21
United States v. Flores, 289 U. S. 137, 53 S. Ct. 580, 77 L. Ed. 1086 39
Winnebago, The, 141 Fed. 945, cert. denied, 200 U. S. 616, 50 L. Ed. 621..... 30
Vancouver S. S. Co. v. Rice, 288 U. S .445, 53 S. Ct. 420, 77 L. Ed. 885 38

Text.

Ruling Case Law, Vol. 1, pp. 408-11 28-30

Constitution—Acts of Congress.

46 U. S. C., § 951, Subsection K, Ship Mortgage Act 2, 4
46 U. S. C., § 861, Section 1, Merchant Marine Act 40, 41
46 U. S. C., § 954, Ship Mortgage Act..... 42
46 U. S. C., § 887, Section 36, Merchant Marine Act 42
46 U. S. C. A. § 911 40
Constitution of United States:
Article III, Section 1 17
Article III, Section 2 17
Article I, Section 8 26
Judiciary Act of 1789, 28 U. S. C., § 41 (3) 17, 31

In The

Supreme Court of the United States

October Term, 1934.

No. 13.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

v.

STEAMER "THOMAS BARLUM," Her Engines, Etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

No. 14.

DETROIT TRUST COMPANY, Trustee,
Petitioner,

v.

STEAMER "JOHN J. BARLUM," Her Engines, Etc.,
BARLUM STEAMSHIP COMPANY,
Respondent.

RESPONDENT'S BRIEF.

(All Italics Ours.)

Certiorari to review decision of Circuit Court of Appeals reversing decrees of District Court foreclosing

"preferred mortgages" under the Ship Mortgage Act. The District Court opinions are reported in *56 F. (2d) 455*, and *2 F. Supp. 733*. The opinions of the Circuit Court of Appeals are reported in *68 F. (2d) 946*.

STATEMENT OF THE CASES.

On May 18, 1931, petitioner, libelant-mortgagee filed libel 1794 in the District Court at Buffalo to foreclose a $200,000 "preferred mortgage" under the Ship Mortgage Act against the steamer "Thomas Barlum" and also libel 1795 to foreclose a similar mortgage against the steamer "John J. Barlum." Jurisdiction *in rem* was predicated solely on the fact that the mortgages were given and recorded under the Ship Mortgage Act. *The libels did not otherwise allege that the suits were maritime in character or involved maritime liens* (R. 4-9, 39-44). Both steamers were forthwith seized by the marshal upon warrants issued in the proceedings and are still in the marshal's custody.

On June 1, 1931, respondent, Barlum Steamship Company, as claimant, filed claims of ownership as to each steamer (R. 1, 117, 118). On July 14, 1931, respondent filed amended exceptions (R. 75) to each of the libels on the stated grounds that the libels did not state a cause within the admiralty and maritime jurisdiction of the court; that no maritime lien was alleged and that Subsection K of the Ship Mortgage Act, 1920 (46 U. S. C., § 951), *insofar as it purports to permit foreclosure of the mortgages by suit in admiralty*, was unconstitutional. On February 17, 1932, District Judge Adler filed opinion (R. 75-76, reported in *56 F. (2d) 455)*, overruling the exceptions, and orders (R. 77-78) were accordingly entered.

On March 3, 1932, respondent filed answers (R. 78-79) renewing the constitutional objection and, as a further defense, alleging that the mortgage indebtedness was for loans to it almost entirely for nonmaritime purposes, i. e., to enable claimant to loan to other enterprises for reduction of their bank and other indebtedness and to pay cost of construction of buildings—in none of which had claimant any interest—all of which was known to libelant when the mortgages were negotiated, executed and delivered. Libelant filed exceptions (R. 79-80) alleging that the constitutional objection had been determined on respondent's exceptions and that the additional defense was insufficient in law, irrelevant and immaterial (R. 79). On May 27, 1932, Judge Adler filed opinion (R. 80, reported in *2 F. Supp. 733),* sustaining the exceptions to the constitutional defense but overruling the exceptions to the additional defense. Orders were accordingly entered (R. 81) June 7, 1932, and the causes set for hearing.

On March 8, 1932, Parry et al., seamen, were granted leave to intervene and filed intervening libels for wages (R. 81-82). *No process was issued on these libels* and the $2881.91 claimed for wages was not disputed.

The testimony for claimant and libelant was taken by deposition (R. 82-180). After hearing and argument Judge Adler, on March 10, 1933, filed opinion (R. 180-182) sustaining the libels. *Detailed findings of fact and conclusion of law* (R. 199-206) *were made* on April 6, 1933. Foreclosure decrees (R. 182-199) were entered April 13, 1933, from which the appeals were taken on July 10, 1933, to the United States Circuit Court of Appeals of the Second Circuit (R. 207-208). The assignments of error (R. 208-211) alleged, in substance, that the court erred in overruling respondent's exceptions to the libels, in sustaining libelant's exceptions re constitutionality, in

holding that the admiralty court had jurisdiction herein under the Ship Mortgage Act and in not holding that the provision of that act conferring admiralty foreclosure jurisdiction was inapplicable to the mortgages herein or was unconstitutional.

The Circuit Court of Appeals (Judges Manton, Chase and Augustus N. Hand, the latter dissenting), *68 F. (2d) 946*, reversed the decree of the District Court—holding against admiralty jurisdiction to foreclose the particular mortgages involved (R. 215-227).

SCOPE OF CONTENTIONS.

Because the facts involved were exceptional and not typical of ship mortgage transactions, we preface our discussion by the following statement:

> "It is not urged that the Ship Mortgage Act is unconstitutional in its entirety nor that Congress, having power to legislate concerning true maritime liens, could not *subordinate* certain of such liens to other, even common law, liens. It is not urged that a purchase money mortgage or a mortgage placed on a ship to raise funds for maritime purposes would be invalid or necessarily without the jurisdiction of the admiralty court. Such contentions are not necessary or pertinent herein. *What is urged is that these particular mortgages, by intendment of the parties and under the circumstances established by the record, were so devoid of connection with maritime purposes that the provisions of Subsection K of the Ship Mortgage Act, 46 U. S. C., § 951, conferring original foreclosure jurisdiction on the District Court in admiralty, either does not, or cannot constitutionally, apply.*"

This restriction of the issues was clearly recognized by the Circuit Court of Appeals in the prevailing opinion, *68 F. (2d) 948-949* (R. 218), as follows:

> "Appellant argues that these mortgages, as the record establishes, were so devoid of connection with maritime purposes and subjects, that the statute should not be construed to confer and cannot confer original jurisdiction of foreclosure in admiralty * * *.
>
> "If it were established that these mortgages were given to support an issue of bonds 'to develop and encourage the maintenance of such a merchant marine' and therefore in accord with the objects of the Ship Mortgage Act, the admiralty jurisdiction to foreclose would be unquestionable. We need not decide whether or not a loan made for maritime purposes secured by a mortgage on a ship will become nonmaritime if the borrower, contrary to the agreement of the mortgage, diverts the money to nonmaritime purposes, nor need we consider what effect any estoppel in such a case would have. We are not called upon to say whether or not Congress could in any event extend the admiralty jurisdiction to a matter so closely related to transportation by navigable waters as to provide for the exclusive enforcement in admiralty of a mortgage on a ship actually engaged in such transportation. It is sufficient to point out here that the mortgagor and mortgagee both knew in advance of making these mortgages that the moneys advanced were not to be used for such purposes, but were intended for and actually were used for nonmaritime purposes. This was fully disclosed at the trial. * * *
>
> "* * * Nowhere in the Merchant Marine Act or the Ship Mortgage Act is it anywhere shown that Congress intended that ship mortgages given by owners to support outside operations such as real estate ventures or to pay past debts not arising in maritime transactions were in contemplation. Mortgage loans of this character are foreign to the idea of maritime operations. The mortgages in question

having been shown to be nonmaritime in intent and character, the admiralty court did not have jurisdiction, and the application to dismiss the suit should have been granted."

The dissenting opinion erroneously assumes and states (R. 224) that respondent contended that the Congress could not confer the status of a *preferred mortgage* upon any other than a true maritime mortgage. Respondent made no such contention. Respondent did contend that there was a distinction between a preferred *mortgage* lien and a *maritime* lien and between the congressional power to confer preference right upon a nonmaritime mortgage by *subordination* of maritime liens thereto and the power by fiat to *convert a nonmaritime* lien into a *maritime* lien and make it, *per se*, the subject of *original* admiralty jurisdiction.

The dissenting opinion also assumes that unless original foreclosure jurisdiction under Subsection K of the Ship Mortgage Act is upheld herein the power of the Congress to give a mortgage preference in distributions is necessarily destroyed. *That problem is not involved in this record.*

The unusual facts referred to require additional statement.

STATEMENT OF FACTS.

The facts are not in dispute.

Respondent.

Respondent, Barlum Steamship Co., is a West Virginia corporation with principal office at Detroit, Michigan. At the times involved it was, and still is, owner of two steel steamers, plying the Great Lakes, known as the "Thomas Barlum" and "John J. Barlum." John J. Barlum was president and Thomas J. Barlum was secretary, of the company (R. 31). In 1927 and 1928 its 3200 shares were held by 14 stockholders, John J. Barlum holding 2561 shares. In 1929, the company had 11 stockholders, John J. Barlum holding 2651 shares (R. 133-135, 170). As a matter of convenience the company maintained separate bank accounts for the steamers (R. 128) and in separate banks (R. 112).

Other Enterprises.

John J. Barlum was connected with several enterprises. *Detroit Trust Co. for years had done business with Mr. Barlum and certain of these enterprises* (R. 83). *"Barlum Land Co."* was an assumed name used by Mr. Barlum in connection with certain of his individual fee and leasehold real estate holdings including those known as Lawyers Building, Dixie Land and Lewis Hotels. In 1925 Mr. Barlum and wife executed a $1,250,000 bond issue mortgage to Detroit Trust Co. as Trustee covering these properties and thereafter conveyed them to *"Barlum Land & Improvement Co."* a Michigan corporation, in exchange for its entire capital stock (R. 100, 111, 137,

144). *"Barlum Realty Co."* is a Michigan corporation owning a forty-story Detroit office building in which corporation John J., Thomas J. and Louis Barlum, proportions not shown, owned the entire capital stock (R. 112, 144). *"Cadillac Square & Improvement Co."* is a limited partnership association which built, owns and operates a twenty-story hotel known as Barlum Hotel, Detroit (R. 125). The stock in the association is owned by the three Barlum brothers, William B. Thompson and his two sons, and three sisters of the Barlums—neither the Thompsons nor the sisters having any interest in the steamship company (R. 144). *"Thomas Barlum & Sons Co."* was a Michigan corporation engaged in the meat packing business in Detroit. Its stock was owned by John J., Thomas J. and Louis P. Barlum. John was manager and head (R. 136, 144). It had made extensive loans from Detroit Trust Co. (R. 136). *Respondent steamship company had no interest in the stock or assets of Barlum Land Co. (R. 138), Barlum Land & Improvement Co. (R. 123, 138), Barlum Realty Co. (R. 138), Cadillac Square Improvement Co. (R. 125, 138), or Thomas Barlum & Sons Co. (R. 144), nor did any of these have any interest in respondent (R. 138).*

We revert to the transactions leading up to the two mortgages involved in the foreclosure decrees herein.

Prior Mortgages.

$100,000 Mortgage, "Thomas," December 1, 1924.

The first mortgage (not under foreclosure herein) executed by respondent was a $100,000 trust mortgage dated December 1, 1924, on the "Thomas" executed to Detroit Trust Co. as trustee to secure an issue of claimant's bonds guaranteed by John J. Barlum, evidencing a loan

by the trust company to respondent (R. 83, 84, 144). The application by respondent to the Michigan Securities Commission relating to the bond issue stated the purpose of the issue was "Settlement of tax claims with the United States Government based on questions of depreciation and invested capital" (R. 85). The Government at the time was asserting a claim of about $100,000 against respondent for additional income and profits taxes. Respondent had employed a tax expert and got the claim reduced to $74,403.29. Respondent had no other pressing obligation (R. 108-109, 136). Mr. Butler, vice-president of the trust company handled the loan for the trust company and knew the purpose of it (R. 135, 137, 152-153). At the time the loan was made the "Thomas" was laid up (R. 109, 136). The loan was not required for the care or maintenance of the steamer (R. 136). Mr. Butler was informed as to the purpose of the loan (R. 137). The trust company purchased the $100,000 of bonds at par and remitted the entire proceeds to respondent which, after payment of the trust company's expense paid $16,786.27 to *Barlum Land Co.*, $5000 to *Barlum Realty Co.*, and $58,204.24 in temporary reduction of claimant's bank indebtedness. In February and March, 1925, respondent paid the Government $74,403.29 in settlement, using the balance of the proceeds of the loan and procuring the remainder by further bank loan (R. 110-111).

$75,000 Mortgage, "Thomas," February 15, 1927.

In January, 1927, $50,000 remained unpaid on the first $100,000 "Thomas" mortgage. It was decided that the trust company make respondent a refunding loan on the "Thomas." On January 28, 1927, the trust company, per Mr. Butler, vice-president, wrote respondent offering to purchase from it a $75,000 issue guaranteed by John

J. Barlum—the papers to be drawn by the trust company's attorneys—$50,000 of the proceeds to be used to retire the $50,000 balance on the first mortgage (Exhibit 3; R. 153-155, 88-89). The trust company (Exhibit 4; R. 155, 90) accounted for the $75,000 proceeds and $450 interest as follows: Balance first mortgage $51,916.65, 2% premium and expenses $1320.20, remittance to respondent $23,213.15. Respondent deposited the $23,213.15 in its "Steamer Thomas Barlum" bank account at American State Bank (R. 112) and used same as follows: Overdraft $1618.49; wages to the master of the *"John J."* $1000; loans to *Thomas Barlum & Sons Co.* $1800; salaries to office employees $199.68; transferred to account of the *"John J."* $1000; loan to the *Barlum Realty Co.* $12,500; loan to Louis P. Barlum $600; paid to American Spiral Pipe Company on a running account $1840; paid to Boland & Cornelius, claimant's agents for their advancements for past fitting out purposes $2400; paid captain of the "Thomas" $150 and bank $112.37. The $1000 transferred to the account of the "John J." was deposited in a bank account known as "Steamer John J. Barlum" in the National Bank of Commerce, out of which bills allocated to that ship were paid (R. 113-117).

$200,000 Mortgage, "Thomas," March 1, 1929.

This is the mortgage foreclosed by the decree of the District Court herein in suit No. 1794.

By February, 1929, the $75,000 mortgage had been reduced to $50,000. Negotiations were had with the trust company (then known as Detroit and Security Trust Company) for an increased loan (R. 92). On February 21, 1929, the trust company by Mr. Butler, vice-president, wrote respondent (Exhibit 7; R. 156-158, 92-93) offering to purchase, at 97%, $200,000 of bonds secured by mort-

gage on the "Thomas" guaranteed by John J. Barlum, documents to be prepared by the trust company's attorneys, and (R. 157) stating:

> "It is understood that as a condition of the above the proceeds of the purchase of said bonds by us are to be used as follows:
>
> | | |
> |---|---|
> | To pay the note issue now outstanding secured by mortgage on the same steamer | $50,000.00 |
> | Interest on the same from February 15th to which it is now paid up to March 1st, 1929 | 125.00 |
> | Annual fee due the trustee | 25.00 |
> | Closing fee due the trustee | 25.00 |
> | Attorneys' charges estimated | 750.00 |
> | Trustee's fee for certifying new bonds | 200.00 |
> | Cost of printing new bonds estimated | 100.00 |
> | *To take up principal debt of John J. Barlum and Thomas Barlum & Sons now held by us to the amount of* | 100,000.00 |
> | Balance to Steamship Company for repairs and refitting the steamers 'Thomas Barlum' and 'John J. Barlum' for the season of 1929 | 42,775.00" |

The $100,000 debt of Mr. Barlum and Thomas Barlum & Sons Co. was for collateral loans long previously made to them respectively by the trust company and had no relation to respondent. Mr. Butler was fully informed as to the details of such debt (R. 93, 96-98, 105-106) and it was contemplated that the debt should be paid as indicated (R. 139).

The mortgage, prepared by the trust company's attorneys (R. 147), dated as of March 1, 1929, was executed and delivered about March 22, 1929, while the boat was laid up. Exhibit A attached to libel (R. 9-38) is a copy of the mortgage.

The application to the Securities Commission (prepared by the trust company) relating to this $200,000 mortgage, stated the purpose of the issue was to *"refinance"* (R. 95; Exhibit 9, R. 160). As shown by the trust company's statement (Exhibit 8, R. 158-159), it withheld from the proceeds of the issue $50,358.33 to take up the balance of the previous issue, $1545.23 for trustee and attorney fees, printing, recording, etc., and:

"Amount required to take up Thomas Barlum & Sons note being principal and interest		$45,510.00
Amount necessary to take up John J. Barlum note, being principal and interest		33,566.50
Amount to apply on account of principal of John J. Barlum note ..	$20,745.50	
Accrued int. to March 25th..	178.00	
		20,923.50
Balance to Barlum Steamship Company		42,896.44"

Respondent deposited the $42,896.44 in bank account "Steamer John J. Barlum" at National Bank of Commerce and paid therewith about $22,000 of accounts relating to the *"John J."* and transferred $20,000 of the balance to the bank account "Steamer Thomas Barlum" at the American State Bank and out of which were paid running accounts allocated to the "Thomas" on account of its previous season's operations (R. 118-122; Exhibit 19, R. 167-170).

Exhibit 23 (R. 171-172) dated March 7, 1929, is a consent of John J., Thomas J., and Louis P. Barlum, stockholders holding 2641 of the 3200 shares of respondent's stock, to the $200,000 mortgage in question. Exhibit 24 (R. 173-174) dated March 7, 1929, is an accompanying resolution of respondent's directors authorizing the mortgage. Exhibit 8-A (R. 159-160) is respondent's written

authorization to the trust company to disburse the proceeds of the bonds as agreed (R. 94). These documents were prepared by the trust company, respondent not being represented by counsel (R. 147).

$200,000 Mortgage, "John J.," December 15, 1927.

This is the mortgage foreclosed by the decree of the District Court herein in suit No. 1795.

Exhibit 13 (R. 166, 162, 99) is the accepted written offer by the trust company to respondent, dated December 23, 1927, to purchase an issue of $200,000 of its bonds on the "John J." at 98, to be guaranteed by John J. Barlum, documents to be satisfactory to trust company's attorneys. The mortgage, dated as of December 15, 1927 (Exhibit A to libel, R. 44-72), prepared by the trust company's attorneys (R. 147) was executed about January 5, 1928, while the boat was laid up. *The understanding was that $82,281.25 was to be withheld by the trust company to pay $50,000 principal and $32,281.25 interest on the $1,250,000 bond issue mortgage executed by John J. Barlum and wife to the trust company on the individual real estate and leaseholds of Mr. and Mrs. Barlum as aforesaid (this brief, pages ....), and also that $10,000 was to be retained by the trust company and applied on an individual note executed by Mr. Barlum to the trust company dated August 11, 1927, evidencing a personal loan made to Mr. Barlum by the trust company* (Exhibit 15, R. 162-163; Exhibit 15-A, R. 163, 100-101, 140). *Respondent had no connection with such items for which said sums were to be withheld.* Such items, together with certain trustee and attorney fees and expenses, were withheld according to the understanding. The remainder of the proceeds of the loan was deposited in the bank account of the *"Thomas"* and used as follows: Paid to Luke

Manion, engineer of the *"Thomas"* for past season services $500; loan to *Thomas Barlum & Sons Co.* $4000; loan to *Cadillac Square Improvement Co.* $52,500; loan to *Barlum Realty Co.* $18,600; loan to *John J. Barlum personally* $5500 (used by him in paying an individual note held by the Romeo Savings Bank); loan to *Lewis Hotel* $19,000 (being one of the properties covered by the $1,250,000 mortgage given by John J. Barlum and wife to the trust company); paid to the captain of the "John J." $500 for services in connection with that steamer and $2000 was transferred to the "Steamer John J. Barlum" account (R. 122-127). *Out of the entire proceeds of the issue only the $500 paid to the master of the "John J." and the $2000 transferred to its account had any connection with the "John J."* (R. 126).

Application was made by respondent to the Securities Commission as to the bonds (Exhibit 14, R. 162). Exhibit 25 (R. 174-176), dated January 4, 1928, is a consent of John J., Thomas J. and Louis P. Barlum, holding 2716 of the 3200 shares of respondent's stock, to the mortgage in question. Exhibit 26 (R. 176-178), dated January 4, 1928, is an accompanying resolution of respondent's directors authorizing the mortgage. Exhibit 15 (R. 162-163), dated January 7, 1928, is respondent's written authorization to the trust company to disburse the proceeds of the bonds in accordance with the understanding (R. 100). These documents were prepared by the trust company, respondent not being represented by counsel (R. 147).

Defaults.

Respondent admits the defaults in the two mortgages as alleged in the libels, i. e., nonpayment on February 1, 1931, of $25,000 principal of bonds re the "Thomas"

(R. 7, 39), and $50,000 principal of bonds re the "John J." December 15, 1930 (R. 42, 73). The amounts found due by the decrees are not questioned.

Remedy Provided In Mortgages.

The sole remedy for foreclosure stipulated in the mortgages is by seizure and sale "WITHOUT" *process of any kind (R. 22-23, 57-58).*

STATEMENT OF POINTS OF LAW.

I

PRIOR TO THE SHIP MORTGAGE ACT IT WAS SETTLED LAW THAT A SHIP MORTGAGE SECURING A PERSONAL LOAN TO THE SHIPOWNER WAS NOT *EX PROPRIO VIGORE*, FORECLOSABLE IN ADMIRALTY—NOT BECAUSE THE CONGRESS HAD NOT CONFERRED SUCH JURISDICTION—BUT BECAUSE, UNDER THE CONSTITUTION AS INTERPRETED BY THIS COURT, NEITHER THE LOAN, THE PRIMARY CONTRACT, NOR THE MORTGAGE, THE INCIDENT THEREOF, WAS A MARITIME CONTRACT. THE CONGRESS HAS NO POWER TO EXTEND ORIGINAL ADMIRALTY JURISDICTION TO A NONMARITIME CONTRACT (HEREIN, PAGES 17-25).

II.

THE POWER OF THE CONGRESS IN CONNECTION WITH ADMIRALTY CANNOT TRANSCEND THE JURISDICTION DELEGATED BY THE STATES TO THE FEDERAL GOVERNMENT UNDER THE CONSTITUTION. THE OBJECTION HEREIN PRESENTS THE SERIOUS QUESTION WHETHER THE LEGISLATIVE BRANCH OF THE FEDERAL GOVERNMENT HAS NOT ENCROACHED UPON THE RESERVED SOVEREIGN POWERS OF THE STATES. THE ATTEMPTED GRANT OF ADMIRALTY JURISDICTION, IF APPLICABLE TO THE MORTGAGES HEREIN, WOULD DEPRIVE THE STATES OF RESERVED JURISDICTION OVER NONMARITIME CONTRACTS BECAUSE FEDERAL ADMIRALTY JURISDICTION IS EXCLUSIVE. NO STATE STATUTE CREATING A MARITIME LIEN, JUSTICIABLE IN ADMIRALTY AND THEREBY WAIVING RESERVED STATE RIGHTS, IS INVOLVED. SUBSECTION K, IF APPLICABLE, IS UNCONSTITUTIONAL (HEREIN, PAGES 26-40).

III.

A FAIR CONSTRUCTION OF THE SHIP MORTGAGE ACT JUSTIFIES A HOLDING THAT IT DOES NOT APPLY TO THE PARTICULAR MORTGAGES INVOLVED. THE ACT SHOULD BE SO CONSTRUED (HEREIN, PAGES 40-43).

IV.

ESSENTIAL JURISDICTION CANNOT BE CONFERRED BY CONSENT OR ESTOPPEL (HEREIN, PAGES 43-45).

LAW ARGUMENT.

MORTGAGE NONMARITIME.

I.

PRIOR TO THE SHIP MORTGAGE ACT IT WAS SETTLED LAW THAT A SHIP MORTGAGE SECURING A PERSONAL LOAN TO THE SHIPOWNER WAS NOT, *EX PROPRIO VIGORE,* FORECLOSABLE IN ADMIRALTY—NOT BECAUSE THE CONGRESS HAD NOT CONFERRED SUCH JURISDICTION—BUT BECAUSE, UNDER THE CONSTITUTION AS INTERPRETED BY THIS COURT, NEITHER THE LOAN, THE PRIMARY CONTRACT, NOR THE MORTGAGE, THE INCIDENT THEREOF, WAS A MARITIME CONTRACT. THE CONGRESS HAS NO POWER TO EXTEND ORIGINAL ADMIRALTY JURISDICTION TO A NONMARITIME CONTRACT.

Article III of the Constitution provides:

> "Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *."
>
> "Section 2. The judicial Power shall extend * * * to all Cases of admiralty and maritime jurisdiction; * * *."

Perforce Section 1, supra, the Congress, by the Judiciary Act of 1789, conferred upon the District Courts original jurisdiction:

> "Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is

competent to give it, * * *." *28 U. S. C., § 41 (3).*

This court early dispelled the idea that the admiralty jurisdiction thus conferred upon the federal courts was the circumscribed power of the English admiral at the time of the adoption of the Constitution.

> *The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston (1848), 6 How. 344, 12 L. Ed. 465.*

That this court was fully conscious of the desirability of making federal admiralty jurisdiction as comprehensive as the needs of navigation, is attested by the above case as well and by the decision of *The Genesee Chief (1851), 12 How. (53 U. S.) 443, 13 L. Ed. 1058,* holding that the admiralty jurisdiction was not limited to tide waters. Certainly this court accorded the constitutional provisions a broad, rather than a restricted, interpretation and in view of such a tendency this court's refusal to uphold jurisdiction over ship mortgages is of great significance.

Bogart v. The Steamboat John Jay (1854), 17 How. (58 U. S.) 399, 15 L. Ed. 95: Libelants had sold the steamer to McMurray, taking a purchase money mortgage for part of the sale price. Upon default in payment of the mortgage note libelants filed libel against the steamer.

> "To this libel George Logan, by way of answer, put in a claim of ownership of The John Jay, by a *bona fide* purchase from McMurray; and he further denies the jurisdiction of the court, upon ground that the contract between the libelants and McMurray was not maritime, or a case of admiralty and maritime jurisdiction * * *.
>
> "Upon the hearing of the cause in the District Court, the libel was dismissed * * *. We think that the affirmance of the judgment of the District Court was right, and will here briefly give our reasons for that opinion.

"It has been repeatedly decided in the admiralty and common law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States. No case can be found in either country where it has been done. In the case of *The Neptune, 3 Hagg., Adm. Rep. 132,* Sir John Nicholl, in giving his judgment, observes: 'Now, upon questions of mortgage, the Court of Admiralty has no jurisdiction, whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a chattel personal, whether he is the legal or only the equitable owner, and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is passed, *the decision of these questions belongs to other courts; they are not within the jurisdiction or province of the courts of admiralty,* which never decide on questions of property between the mortgagee and owner.'

"This is not so, because such a jurisdiction had been denied by the jealousy of the courts of the common law. Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. It is a security to make the performance of the mortgagor's undertaking more certain; and whilst he continues in possession of the ship, disconnecting the mortgagee from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account. *Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. In such a case, the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose. There cannot be, then, anything maritime in it. A failure to perform such a contract cannot make it maritime."*

There was no dissent from this opinion and seven of the justices who participated in the decision of The Genesee Chief in 1851 were still members of this court.

Schuchardt v. Ship Angelique (1856), 19 How. (60 U. S.) 239, 15 L. Ed. 625.

Mortgagees filed *libel* in the District Court against the proceeds of a ship sold under decrees entered upon other libels based on maritime liens. The court dismissed the mortgagee's libel, saying:

> *"The libel filed in this case is a libel simply to foreclose a mortgage, or to enforce the payment of a mortgage, and the proceeding cannot therefore be upheld within the case of Bogart v. The John Jay, heretofore decided by this court (17 How.) 58 U. S. 399.*
>
> *"The proper course for the mortgagees was to have appeared as claimants to the libels filed against the vessel, in which the questions presented in the case might have been raised and considered; * * *."*

The People's Ferry Co. v. Beers (1858), 20 How. (61 U. S.) 393, 15 L. Ed. 961.

Libel against a new ferry boat for balance due the builders for its construction under a contract reserving a lien to secure payment. The District Court upheld admiralty jurisdiction. In reversal, this court said:

> "The lien reserved by the contract, is not set up in the libel, *nor can it avail, as it amounted to nothing more than a mortgage on the vessel for a debt.* * * *
>
> *"The question presented involves a contest between the State and Federal Governments. The latter has no power or jurisdiction beyond what the Constitution confers; * * *. The extent of power withdrawn from the States, and vested in the General Government, depends on a proper construc-*

tion of the constitutional provision above cited. Its terms are indefinite, and its true limits can only be ascertained by reference to what cases were cognizable in the maritime courts when the Constitution was formed—for what was meant by it then, it must mean now; what was reserved to the States, to be regulated by their own institutions, cannot be rightfully infringed by the General Government, either through its Legislative or Judiciary Department. The contest here is not so much between rival tribunals, as between district sovereignties, claiming to exercise power over contracts, property, and personal francises. * *

"The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation. * *

"In considering the foregoing description, it must be borne in mind that liens on vessels encumber commerce, and are discouraged; so that where the owner is present, no lien is acquired by the materialman; nor is any, where the vessel is supplied or repaired in the home port * * *. So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), *it was a contract made on land, to be performed on land.* The wages of the shipwrights had no reference to a voyage to be performed; they had no interest or concern whatever in the vessel after she was delivered to the party for whom she was built; they were bound to rely on their contract." * * *

Accord: *Grant Smith-Porter Co. v. Rohda, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008; Thames Towboat Company v. The Schooner Francis McDonald, 254 U. S. 242, 41 S. Ct. 65, 65 L. Ed. 245.*

The Lottawanna (1874), 21 Wall. (88 U. S.), 558, 22 L. Ed. 654:

"In this case the appellants themselves have no

maritime lien, but merely a mortgage to secure an ordinary debt not founded on a maritime contract. They, therefore, have no standing in court, except under the 43rd Admiralty Rule, and in the manner above indicated."

The J. E. Rumbell (1892), 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345:

> *"An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it or to assert either title or right of possession under it* * * *. But it has jurisdiction, after a vessel has been sold by its order and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the materialmen in this case. * * *
>
> *"The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien,* * * *."

The Freights of the Kate (D. C. N. Y.), 63 Fed. 707, 720, in which Mr. Justice Brown said:

> "A letter of credit, like a loan of money, is in itself indifferent in character; it may be maritime, or nonmaritime, according to the objects of the loan, the intent of the parties, and the circumstances attending it. Maritime contracts are contracts that pertain to maritime commerce and navigation. A letter of credit issued for the purpose of directly aiding the prosecution of current voyages, and upon the faith of the freights to be earned, as a part of the contract, is as purely maritime as a bottomry bond; and no commercial transactions are more characteristically maritime than these."

THE BONDS ARE THE PRIMARY OBLIGATIONS TO WHICH THE MORTGAGES ARE MERE INCIDENTS.

Carpenter v. Longan, 16 Wall. (83 U. S.) 271, 21 L. Ed. 313.

The foregoing decisions (pages 18-23 hereof) state the factors which render a loan and ship mortgage non-maritime in character. The loans herein were merely *personal* contracts, in no way involving navigation or the perils of the sea. The mortgages were mere *security* for performance of the personal contract and in no way involved the use of the steamers in navigation.

MARITIME LIENS ENCUMBER COMMERCE AND ARE *STRICTI JURIS.*

Krauss Bros. Lumber Co. v. Dimon S. S. Corp., Vol. 78 Adv. Op. page 91;
Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 41 S. Ct. 1, 65 L. Ed. 97;
The Kalfarli (C. C. A. 2), 277 Fed. 391;
The People's Ferry Co. v. Beers, infra, page 20.

Subsection P of the Ship Mortgage Act (46 U. S. C. § 971) quoted in petitioner's brief, page 54, creates a lien enforceable by suit *in rem* for repairs, supplies, etc., to all ships, without the necessity of proving that credit was given to the vessel. So far as pertinent this section is the same as Section 1 of Act June 23, 1910, c. 373 (36 Stat. at L. 604), which was construed in *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., supra* petitioner's brief, page 25) to exclude admiralty jurisdiction to enforce a lien for coal furnished to an embarrassed canning and fishery company *for use in its factory and fishing steamers on the understanding that*

under the law the coal company would have such a lien. This court commented:

> "And it was clearly understood that the purchasing corporation would apply part of the coal to a non-maritime use."

THE FACT THAT THE CONTRACTS INVOLVED WERE NOT WHOLLY MARITIME WOULD PRECLUDE ORIGINAL ADMIRALTY JURISDICTION.

Grant v. Poillon, 20 How. (61 U. S.) 162, 15 L. Ed. 871:

Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co. ante, page 23.

Pillsbury Flour Mills Co. v. Interlake SS. Co. (C. C. A. 2), 40 F. (2d) 439, certiorari denied in *282 U. S. 845, 51 S. C. 24, 75 L Ed. 750:* Libel for damage to wheat shipped under contract for transportation from Milwaukee to Buffalo and winter storage at destination. In denying admiralty jurisdiction the court said:

> "'A contract to be "wholly maritime," means that the principal subject matter of agreement gives character to the whole.' * * *. After reviewing the cases, we concluded that contract rights are maritime and within the admiralty jurisdiction when they relate to the ship as an instrument of commerce, and pointed out that a contract for the wharfage of a ship withdrawn from commerce is not maritime and will not support a maritime lien."

The Richard Winslow (C. C. A. 7), 71 Fed. 426:

> "*A maritime contract must therefore concern transportation by sea. It must relate to navigation, and to maritime employment. It must be one of navigation and commerce on navigable waters.* Unquestionably there was here a contract for carriage by sea, and that contract was maritime in its nature.

But there was joined with it a contract with respect to the cargo after the completion of the voyage that was in no respect maritime in its nature.''

Accord: *The Milwaukee (D. C. N. Y.), 15 F. (2d) 886; El Oriente (D. C. N. Y.), 5 F. (2d) 251.*

ADMIRALTY COURTS ARE NOT COURTS OF EQUITY.

Bogart v. The Steamboat John Jay, infra page 18;

The People's Ferry Co. v. Beers, infra page 20;

Rea v. The Steamer Eclipse, 135 U. S. 599, 10 S. Ct. 873, 34 L. Ed. 269;

The Ada (C. C. A. 2), 250 Fed. 194;

Kellum v. Emerson, Fed. Cas. No. 7669.

CONGRESS—LACK OF POWER.

II.

THE POWER OF THE CONGRESS IN CONNECTION WITH ADMIRALTY CANNOT TRANSCEND THE JURISDICTION DELEGATED BY THE STATES TO THE FEDERAL GOVERNMENT UNDER THE CONSTITUTION. THE OBJECTION HEREIN PRESENTS THE SERIOUS QUESTION WHETHER THE LEGISLATIVE BRANCH OF THE FEDERAL GOVERNMENT HAS NOT ENCROACHED UPON THE RESERVED SOVEREIGN POWERS OF THE STATES. THE ATTEMPTED GRANT OF ADMIRALTY JURISDICTION, IF APPLICABLE TO THE MORTGAGES, WOULD DEPRIVE THE STATES OF RESERVED JURISDICTION OVER NONMARITIME CONTRACTS BECAUSE FEDERAL ADMIRALTY JURISDICTION IS EXCLUSIVE. NO STATE STATUTE CREATING A MARITIME LIEN, JUSTICIABLE IN ADMIRALTY AND THEREBY WAIVING RESERVED STATE RIGHTS, IS INVOLVED. SUBSECTION K, IF APPLICABLE, IS UNCONSTITUTIONAL.

Vide, *The People's Ferry Co. v. Beers, infra, page 20,* and *The Genesee Chief, infra, page 18.*

The New England Marine Ins. Co. v. Dunham, 11 Wall. (78 U. S.) 1, 20 L. Ed. 90:

> *"As far as regards civil cases, therefore, the jurisdiction of these courts was thus made coextensive with the constitutional gift of judicial power on this subject."*

No interstate commerce is involved in the present controversy. It is significant that in Article I, Section 8 of

the Constitution, defining the power of the Congress, the subject of admiralty is not mentioned. The connection of the Congress with that subject is through Article III, Section 1 which permits the Congress to *apportion the judicial power conferred by the states but which cannot sustain an arrogated increase of power.*

Crowell v. Benson, 285 U. S. 22, 55, 52 S. Ct. 285, 76 L. Ed. 598, 615, upholding The Longshoremen's and Harbor Workers' Act providing compensation to workmen for injuries occurring *upon navigable waters.* This court, by Mr. Chief Justice Hughes, said:

> *"These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§ 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.*
>
> *"In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction* * * *. Again, it cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations."* * * *

THE CONGRESS CANNOT ENLARGE THE GRANT OF ADMIRALTY JURISDICTION.

Crowell v. Benson, supra;

Meyer et al. v. Tupper (1861), 1 Black (66 U. S.) 522, 17 L. Ed. 180;

The Lottawanna (1874), 21 Wall. (88 U. S.), 588, 22 L. Ed. 654.

FEDERAL ADMIRALTY JURISDICTION TO ENFORCE A LIEN IS EXCLUSIVE. SUBSECTION K OF THE SHIP MORTGAGE ACT EXPRESSLY PROVIDES THAT JURISDICTION THEREUNDER SHALL BE EXCLUSIVE.

Prior to the Ship Mortgage Act an ordinary ship mortgage securing a general loan to the ship owner was a local matter and, as such, was within the jurisdiction of the state courts both as to actions *in personam* and *in rem*. If the Congress, by its fiat, can convert such a mortgage into a maritime lien, the jurisdiction of the state is automatically divested. This, it is respectfully contended, cannot be done without the approval of the state or amendment of the Constitution.

That it should not be done is also clear. For example, take the mortgages herein. The steamers were laid up in Buffalo when the mortgages were executed and delivered. They might never have left the Buffalo docks before default. Could the state courts of New York constitutionally be deprived of foreclosure jurisdiction in such event? Supposing these were construction mortgages and the steamers had not been completed and the mortgages became in default. Could not the state courts entertain foreclosure? That the state courts would have such jurisdiction is clear. That they would lose such jurisdiction if Subsection K is upheld is equally clear. That the state courts cannot be deprived of such rights would seem to follow although it is not necessary to go that far to decide the instant cases. We stress the statement that no state statute creating an admiralty lien, *and thereby surrendering the state's jurisdiction*, is involved and refer to the following text and cases which indicate the circumstances under which a state's power may become subordinate to federal admiralty jurisdiction.

1 Ruling Case Law:

"Where a state statute creates a new right of ac-

tion *touching a subject which is held to be maritime in its nature,* the District Court may give effect to the enactment by a suit *in rem,* if the statute gives the lien necessary to support that form of proceeding, or by a suit *in personam* in case no lien is granted. Nor is such an enactment invalid because the state courts have no jurisdiction to enforce it by a proceeding *in rem.* The District Courts are not bound to enforce liens created by state laws, but will do so nevertheless whenever the interests of justice will be promoted and the provisions of the statute are not antagonistic to or in derogation of the principles of the maritime law. *Of course the right of action created by the statute must arise out of a transaction which relates to navigation and things maritime*" (p. 408).

(Referring to the Judiciary Act of 1789): "The states are held thereby to be prohibited from establishing courts having cognizance of cases of admiralty and maritime jurisdiction, according to the course of proceedings in courts of admiralty; *and hence a state court can have no jurisdiction of a suit in rem which is cognizable by the District Court.* * * * (pp. 408-9)

"As previously shown, the states may not give their courts the right to proceed *in rem* for maritime causes of action. All causes which the admiralty courts have declared to be maritime in character, and which those courts have held to give rise to maritime liens, are within the jurisdiction of the District Courts exclusively * * *. Thus, for example, contracts for the construction of vessels, and for the furnishing of materials therefor, before they are launched, being nonmaritime, liens and proceedings *in rem* to enforce such liens are under state control, and may be enforced in the state courts. * * * p. 410)

"It remains to consider the jurisdiction of a state court to enforce by proceedings *in rem* a lien given by local statute in aid *of a cause which the admiralty courts have held to be maritime in character* but not supported by a lien under the general maritime law.

It is established that a lien created by such a statute is so far maritime that the admiralty courts may enforce it by process *in rem;* and while there seems to have been at one time some difference of opinion on the point, and some state decisions are to the contrary, the Supreme Court now declares *the jurisdiction of the District Courts to be exclusive in such cases, denying the power of local statutes to confer upon the state courts jurisdiction of proceedings in rem, even though the maritime law does not give a lien.*" * * * (p. 411)

The Winnebago (C. C. A. 6), 141 Fed. 945, certiorari denied, *200 U. S. 616, 50 L. Ed. 621:*

"Passing from these predicates, we observe that *it is also to be accepted as settled law that contracts, whether for the building of ships or for furnishing materials for their construction are not maritime in their nature, nor are liens given upon ships while in course of construction maritime liens.* This doctrine was affirmed by this court in *The John B. Ketchem, 97 Fed. 872, 38 C. C. A. 518,* and is supported by many decisions of the Supreme Court. * * *

"*It seems to follow by obvious sequence that, in creating liens of this character and conferring upon their own courts the power to enforce them, state legislation does not derogate from the jurisdiction of the admiralty courts of the United States* * * *. *If the contract is not of a maritime nature, it is of no concern to the federal jurisdiction what remedies the state may provide, whether in rem or otherwise. 'If,' said Mr. Justice Brown, in Knapp, Stout & Company v. McCaffrey, supra, 'a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the state.* Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or material furnished in its construction, * * * we held, in *Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487,* that, in respect to such contracts, it was competent

for the states to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement *in rem.*' The *owner of a ship may make a nonmaritime contract and mortgage his ship to secure it, or it may be seized on mesne or final process; and in both cases the ship may be sold for the satisfaction of the debt on the order of a common law court without recourse to the admiralty jurisdiction.*"

The Moses Taylor v. Hammons, 4 Wall. (71 U. S.) 411, 18 L. Ed. 397. California statute provided for state court proceedings *in rem* against a ship for nonperformance of contracts of transportation. In holding that the state court had no such jurisdiction Mr. Justice Field said:

"The question presented for our determination is, therefore, whether such cognizance by the Federal Courts is exclusive; and this depends either upon the constitutional grant of judicial power, or the validity of the provision of the 9th section of the Act of Congress. * * *

"The Judiciary Act of 1789, in its distribution of jurisdiction to the several Federal Courts, recognizes and is framed upon the theory *that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal Courts.* * * *

"The case before us is not within the saving clause of the 9th section. That clause only saves to suitors 'the right of a common law remedy, where the common law is competent to give it.' *It is not a remedy in the common law courts which is saved, but a common law remedy. A proceeding in rem, as used in the admiralty court is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute.*"

The last quoted paragraph was quoted with approval in the recent case of *Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171.*

The Belfast, 7 Wall. (74 U. S.) 624, 19 L. Ed. 266. Alabama statute provided for lien for supplies furnished ships within the state and enforcement by libel in state courts. Libel dismissed.

> "Original cognizance is exclusive in the District Courts, except that the suitor may, if he sees fit, elect to pursue a common law remedy in the state courts, or in the Circuit Court, as before explained, in all cases where such a remedy is applicable. *Common law remedies are not applicable to enforce maritime lien by a proceeding in rem and, consequently, the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the District Courts. The Moses Taylor,* * * *.
>
> "State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceeding *in rem*, as practiced in the Admiralty Courts." * * *

Leon v. Galceran, 11 Wall. (78 U. S.) 185, 20 L. Ed. 74. Right to proceed *in personam* in state court for mariner's wages upheld.

> "State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceedings *in rem*, as practiced in the admiralty courts; but whenever a maritime lien arises the injured party may pursue his remedy by a suit *in personam* or by a proceeding *in rem* at his election. *Such a party may proceed in rem in the admiralty, and if he elects to pursue his remedy in that mode, he cannot proceed in any other form, as the jurisdiction of the admiralty courts is exclusive in respect to that mode of proceeding*, but such a party is not

restricted to that mode of proceeding even in the admiralty court, as he may waive his lien and proceed *in personam* against the owner or master of the vessel in the same jurisdiction, nor is he compelled to proceed in the admiralty at all, as he may resort to his common law remedy in the state courts, or in the Circuit Court, if he and his debtor are citizens of different states. * * *

"*Common law remedies are not competent to enforce a maritime lien by a proceeding in rem and, consequently, the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the District Courts* * * *. Authority, therefore does not exist in a state court to hear and determine a suit in rem, founded upon a maritime contract in which a maritime lien arises, for the purpose of enforcing such a lien. Jurisdiction in such cases is exclusively in the District Courts,* subject to appeal as provided in the acts of Congress, but such a lien does not arise in a contract for material and supplies furnished to a vessel in her home port, *and in respect to such contracts it is competent for the states to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement.*"

Norton v. Switzer, 3 Otto (93 U. S.) 355, 23 L. Ed. 903, holding maritime lien does not arise under contract for ship repairs in home port.

"Authority does not exist in the state courts to hear and determine a suit *in rem* as in the Admiralty Courts to enforce a maritime lien * * *.

"Contracts for ship building are held not to be maritime contracts and, of course, they fall within the same category; *but in all cases where a maritime lien arises, the original jurisdiction to enforce the same by a proceeding in rem is exclusive in the District Courts sitting in admiralty.*"

The J. E. Rumbell, 148 U. S. 1, 13 S. Ct. 498, 37 L. Ed. 345. Question whether priority of a mortgage given by state statute over maritime liens was binding in admiralty. Mr. Justice Gray said:

> "In the admiralty and maritime law of the United States, as declared and established by the decisions of this court, the following propositions are no longer doubtful: * * *
>
> "For repairs or supplies in the home port of the vessel, no lien exists, or can be enforced in admiralty, under the general law, independently of local statute * * *.
>
> "*Whenever the statute of a state gives a lien to be enforced by process in rem against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States.* * * *
>
> "*This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty.* * * *
>
> "The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the legislation of a state. *No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure.* * *

"An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it * * *. But it has jurisdiction, after a vessel has been sold by its order and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the materialmen in this case * * *.

"It would seem to follow that any priority given by the statute of a state, or by decisions at common law or in equity, is immaterial; and that the admiralty courts of the United States, enforcing the lien *because it is maritime in its nature, arising upon a maritime contract,* must give it the rank to which it is entitled by the principles of the maritime and admiralty law."

The Roanoke, 189 U. S. 185, 23 S. Ct. 491, 47 L. Ed. 770. State statute provided for priority lien on ships for repairs and enforcement thereof in admiralty. Libel for such lien was filed in the Federal District Court:

"* * * we have several times had occasion to hold that where Congress has dealt with a subject within its exclusive power, *or where such exclusive power is given to the Federal Courts, as in cases of admiralty and maritime jurisdiction, it is not competent for states to invade that domain of legislation, and enact laws which in any way trench upon the power of the Federal Government.* * * *

"Bearing in mind that exclusive jurisdiction of all admiralty and maritime cases is vested by the Constitution in the Federal Courts, * * * the statute of the state of Washington, insofar as it attempts to control the administration of the maritime law by creating and superadding conditions for the

benefit of a particular class of creditors, and thereby depriving the owners of vessels of defenses to which they would otherwise have been entitled, is an unlawful interference with that jurisdiction, and to that extent is unconstitutional and void."

American Steamboat Co. v. Chace, 16 Wall. (83 U. S.) 522, 21 L. Ed. 369:

"* * * *Jurisdiction to enforce maritime liens by proceedings in rem is exclusive in the admiralty courts.* State courts, therefore, are incompetent to afford a remedy in such a case, as they do not possess the power to issue the appropriate process to enforce the lien and give effect to the proceeding. Vested exclusively as such power is in the admiralty courts, it is settled law that the state legislatures cannot authorize state courts to exercise jurisdiction in such a case by a proceeding *in rem.*"

Perry v. Haines, 191 U. S. 17, 24 S. Ct. 8, 48 L. Ed. 73, opinion by Mr. Justice Brown:

"This case raises the question of the construction and constitutionality of the statutes of the state of New York, giving a lien for repairs upon vessels, and providing for the enforcement of such lien by proceedings *in rem* * * *. That a state may provide for liens in favor of materialmen for necessaries furnished to a vessel in her home port, or in a port of the state to which she belongs, *though the contract to furnish the same is a maritime contract,* and that such liens can be enforced by proceedings *in rem* in the District Courts of the United States, is so well settled by a series of cases in this court as to be no longer open to question.

* * *

"It is equally well established that, *for causes of action not cognizable in admiralty, either in rem or in personam, the states may not only grant liens, but may provide remedies for their enforcement.* Contracts for the building of a ship are the most prom-

inent examples of such as are not maritime in their character, and hence within this rule. * * *

"In all these cases the distinction is sharply drawn between a common law action *in personam,* with a concurrent attachment against the goods and chattels of the defendant, subject, of course, to any existing liens, *and a proceeding in rem against the vessel as the debtor or 'offending thing,' which is the characteristic of a suit in admiralty.* * * * The former is in strict analogy to a common law proceeding, and is a concurrent remedy. *The latter is a proceeding distinctively maritime, of which exclusive jurisdiction is given to the admiralty courts.*"

THE CONGRESS MAY PRESCRIBE FORMS, MODE AND RULES OF JUDICIAL PROCEEDINGS WITHIN THE DEFINED ADMIRALTY JURISDICTION OF THE COURTS BUT CANNOT MAKE MARITIME A NONMARITIME CAUSE OR TRANSACTION. WITHIN SUCH CONFINES ONLY CAN IT BE SAID THAT THE CONGRESS MAY AMEND THE ADMIRALTY LAW. ANALYSIS WILL DISCLOSE NO DECISION UPHOLDING CONGRESSIONAL REGULATION EXCEPT AS TO A MATTER UNQUESTIONABLY MARITIME.

For example:

In *The General Smith, 4 Wheat. 438, 4 L. Ed. 609,* this court drew the sharp distinction between "process" and "jurisdiction" saying that the creation by local law of a lien enforceable *in rem* in admiralty for ship supplies was merely to supply a *process* in connection with *existent maritime jurisdiction because the contract for supplies was in itself maritime and within the established jurisdiction of the admiralty court to proceed in personam. Nothing more than a mode of procedure was involved.*

In *Meyer et al. v. Tupper et al., 1 Black (66 U. S.), 522, 17 L. Ed. 180,* the same view was taken as to *Admiralty Rule 12* recognizing such liens.

In *Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 3 S. Ct. 379, 27 L. Ed. 1038, this court said:*

> "The rule of *limited liability* prescribed by the Act of 1851 is nothing more than the old maritime *rule* administered in courts of admiralty in all countries except England from time immemorial; and if this were not so, the subject matter itself is one that belongs to the department of maritime law."

The underlying cause of action involved was unquestionably maritime and over which the admiralty court had jurisdiction. *The act of Congress merely controlled the procedure relating to the enforcement of that jurisdiction and, in our opinion, did no more than alter a rule of recoverable damages in such cases.* The same is true of *Richardson v. Harmon, 222 U. S. 96, 32 S. Ct. 27, 56 L. Ed. 110,* on which petitioner relies, wherein the underlying cause of action was the liability of a ship which, in its navigation, damaged a bridge.*

In *Crowell v. Benson, infra, page 27,* cited also by petitioner, the claims to which the Act applied were within the admiralty jurisdiction. This court therein specifically repudiated the idea that the Congress could create a maritime *cause of action* where none previously existed and denied that the Congress could even substitute findings for ultimate court decision as to the existence of *jurisdictional* facts.

Panama R. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748, upheld the Jones Act on the theory that it

---

*Similarly, in *Vancouver S. S. Co. v. Rice, 288 U. S. 445, 53 S. Ct. 420, 77 L. Ed. 885,* the injuries to the stevedore were inflicted on the vessel in the course of loading in navigable waters. The lien on the vessel given by the state statute for the resulting death on shore was held to be subject to admiralty jurisdiction.

did not create a maritime cause of action but merely regulated procedure.

To create a lien in connection with a matter already subject to maritime jurisdiction is one thing—*but to attempt thereby to create jurisdiction where none existed is another.* That the existence of a lien merely has not been an accepted basis of our admiralty jurisdiction is also attested by the fact that under the civil law many liens against ships existed that were not enforceable in original proceedings *in rem* under our law because the underlying cause of action was, by our courts, held to be nonmaritime.

The states have not voluntarily yielded their control over nonmaritime mortgages and until they do, it is respectfully submitted, the Congress cannot arbitrarily force them to do so by conferring exclusive jurisdiction thereover upon the federal courts. Subsection K is unconstitutional, if it is applicable.*

*We see nothing in *United States v. Flores, 289 U. S. 137, 53 S. Ct. 580, 77 L. Ed. 1086* (petitioner's brief, page 36), which militates against our contentions. The murder, in that case, was committed on an American vessel while unloading in a foreign port. Both the crime and the operation of the ship were within the recognized scope of maritime jurisdiction.

APPLICABILITY OF SUBSECTION K, SHIP MORTGAGE ACT.

III.

A FAIR CONSTRUCTION OF THE SHIP MORTGAGE ACT JUSTIFIED THE HOLDING THAT IT DOES NOT APPLY TO THE PARTICULAR MORTGAGES INVOLVED. THE ACT SHOULD BE SO CONSTRUED.

Crowell v. Benson, infra, page 27:

> "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that such a construction is permissible and should be adopted in the instant case."

Accord: *Panama R. R. Company v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748.*

Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239:

> "A statute may be invalid as applied to one state of facts, and yet be valid as applied to another."

The Ship Mortgage Act is also known as Section 30 of the Merchant Marine Act 1920. *Vide* historical notes to 46 U. S. C. A., § 861 and § 911.

Petitioner argues that the decision below will defeat the desired and necessary results which the Merchant Marine Act was designed to accomplish.

Section 1 of the Merchant Marine Act, 1920, 46 U. S. C., § 861, reads:

> "It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, insofar as may not be inconsistent with the express provisions of this chapter, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained."

We can easily perceive that the Congress might have power to extend admiralty jurisdiction to matters *directly connected with maritime operations* and that it might be contended successfully that a ship construction or purchase money mortgage, executed as an incident to placing, continuing or maintaining the ship in operation and navigation, is a proper subject for federal legislation, *but the Ship Mortgage Act and the Merchant Marine Act may be searched in vain for any indication that ship mortgages given by shipowners for construction and operation of office buildings and hotels and payment of real estate bonds and personal obligations of others, would so contribute to the purposes of the acts as to be within their contemplation. Such mortgages are not only foreign, but in fact opposed, to the true intent and purpose of the acts.* That such a conclusion is not without

judicial support is evident from the following statement in *People's Ferry Co. v. Beers, infra, page 20:*

> "* * * it must be borne in mind that liens on vessels encumber commerce and are discouraged; * * *."

That the liens against The Thomas and The John J. have encumbered commerce is attested by their consequent enforced idleness since May, 1931.

Petitioner's counsel in appendix to their brief, pages 44-45, quoting the Ship Mortgage Act, omitted § 954 thereof (46 U. S. C., § 954) providing:

> "(a) Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this chapter, bring suit *in personam* in admiralty in a District Court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof.
>
> "(b) This chapter shall not be construed, in the case of a mortgage covering, in addition to vessels, realty or personalty other than vessels, or both, to authorize the enforcement by suit *in rem* in admiralty of the rights of the mortgagee in respect to such realty or personalty other than vessels."

It would seem that this provision, like the entire act, is dehors the power of the Congress unless restricted in scope to maritime contracts.

Section 36 of the Merchant Marine Act, 46 U. S. C., § 887, provides:

> "If any provision of this and the following chapter is declared unconstitutional *or the application of any*

provision to certain circumstances be held invalid, the remainder of such chapters and the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby."

The "following chapter" referred to is the Ship Mortgage Act.

Even in the absence of such a saving clause the courts have generally held that partial invalidity does not necessarily require holding an entire act unconstitutional. For federal cases making elision and enforcing remainder see list appended to the decision in *Roberts v. Atlantic Oil Producing Co. (C. C. A. 6), 295 Fed. 16, 19.*

It is significant that the Congress in Subsection K of the Ship Mortgage Act did not attempt to say that a preferred mortgage created by the act was to be a *"maritime lien"* but merely provided that such be a *"preferred mortgage lien."* It is submitted the act should not have been accorded an unconstitutional purpose but was properly held, as to Subsection K, inapplicable to the mortgages herein. The act, even if inapplicable to the instant mortgages can nevertheless be applicable to all maritime mortgages and even as to nonmaritime mortgages may possibly have the lawful effect of establishing the *basis of priority* as against true maritime liens.

IV.

ESSENTIAL ORIGINAL ADMIRALTY JURISDICTION CANNOT BE CONFERRED BY CONSENT OR ESTOPPEL.

Counsel's suggestion of an estoppel would be material if respondent was denying the validity or preferred

status of the mortgages as mortgage liens rather than questioning the essential original jurisdiction of the court to foreclose them.

Petitioner's counsel seem to have exaggerated the consequences which will follow affirmance.

On pages 28-29 of petitioner's brief are cited:

The Oconee (D. C. Va., 1922), 280 Fed. 927;
The Nanking (D. C. Cal., 1923), 292 Fed. 642;
The Lincoln Land (D. C. Mass., 1923), 295 Fed. 358.

In the case of *The Oconee* the court had acquired original jurisdiction under a maritime lien for supplies. The United States filed an *intervening* petition claiming priority payment under a preferred mortgage. It was contended that the *whole* Ship Mortgage Act was unconstitutional. No question of jurisdiction was involved as the court had properly acquired jurisdiction over the res.

In the case of *The Nanking* the initiatory libel apparently was for enforcement of a true maritime lien followed by *intervening* libel by the mortgagee, to which libel exceptions based on claimed unconstitutionality of the Act were overruled.

In the case of *The Lincoln Land* the mortgagee apparently filed the libel, and, so far as the report indicates, a sale occurred before any attack was made on the validity or extent of the mortgage. Intervening libels based on maritime liens for supplies and lighterage were filed and such claimants denied the priority of the mortgage over their claims.

The three cases, as well as those in which constitutionality was assumed, are not in point and present no conflict with the decision of the Court of Appeals herein.

CONCLUSION.

It is urged that the decrees of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

GEORGE E. BRAND,
THOMAS C. BURKE,
CHARLES S. DESMOND,
Counsel for Respondent.

September 24, 1934.

SUPREME COURT OF THE UNITED STATES.

Nos. 13 and 14.—October Term, 1934.

Detroit Trust Company, Trustee, Petitioner, 13 *vs.* Steamer "Thomas Barlum", her Engines, etc.; Barlum Steamship Company. Detroit Trust Company, Trustee, Petitioner, 14 *vs.* Steamer "John J. Barlum", her Engines, etc.; Barlum Steamship Company.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 5, 1934.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

These are suits in admiralty to foreclose two mortgages given by the Barlum Steamship Company upon the vessels "Thomas Barlum" and "John J. Barlum", respectively. The mortgages purported to be preferred mortgages under the Ship Mortgage Act, 1920. 41 Stat. 1000-1006; 46 U. S. C., c. 25, secs. 911-984. The mortgagor, appearing as claimant, contended that the admiralty was without jurisdiction. The District Court overruled that contention and, finding that all the requirements of that Act had been met, entered decrees of foreclosure and sale. 56 F. (2d) 455; 2 Fed. Supp. 733. In the case of the "John J. Barlum" the decree provided for the recovery by certain seamen, intervening libelants, of amounts due for wages, as preferred maritime liens. The Circuit Court of Appeals reversed the decrees, holding that the suits should have been dismissed for the want of jurisdiction. 68 F. (2d) 946. This Court granted certiorari. 292 U. S. 619.

The mortgagor, at the time the mortgages were executed, was a close corporation, about four-fifths of its shares being owned by John J. Barlum who was also interested in several non-maritime enterprises. The mortgage, in No. 13, on the "Thomas Barlum"

was executed in March, 1929, to petitioner, as trustee, to secure $200,000 of bonds which were purchased by petitioner with a definite understanding as to the application of the proceeds. Approximately $50,000 were to meet obligations secured by a prior mortgage upon the same vessel; about $100,000 were to take up loans of John J. Barlum and Thomas Barlum & Sons, a concern which was engaged in a non-maritime enterprise; and the remainder, about $42,000, were to provide for repairs and for refitting the vessels "Thomas Barlum" and "John J. Barlum". The mortgage was executed while the "Thomas Barlum" was laid up.

The mortgage, in No. 14, on the "John J. Barlum" was executed in December, 1927, to petitioner, as trustee, to secure an issue of $200,000 of bonds purchased by petitioner with the understanding that, of the proceeds, petitioner was to retain about $82,000 to cover principal and interest on bonds of John J. Barlum secured by a mortgage on real estate, and about $10,000 to be applied on one of his notes. Most of the remaining proceeds, which were paid over to the mortgagor, was used to take up loans in connection with non-maritime enterprises, only a small part being devoted to payments relating to the operation of the vessels.

In both instances, the bonds secured by the mortgages were negotiable bonds and were purchased by petitioner for sale to the general public and were largely so sold.

There is no question as to the validity of the mortgages or of the bonds which they secure or as to the default in payment. The question is solely one of jurisdiction in admiralty of the foreclosure suits. Respondent contends that the mortgages "were so devoid of connection with maritime purposes" that the provision of the Ship Mortgage Act conferring jurisdiction in admiralty "either does not, or cannot constitutionally, apply."

The Circuit Court of Appeals was divided in opinion. The majority of the judges, without passing on the extent of congressional authority, thought that it was sufficient to point out that the mortgagor and mortgagee knew, before the mortgages were made, that the moneys advanced "were intended for and actually were used for non-maritime purposes", and they concluded that the provisions of the Ship Mortgage Act did not extend to such a case. The minority view, supporting the decision of the District Court, was that the Congress intended to encourage the investment of

capital in ships; that it might well be that this object could best be promoted by allowing vessels "to be hypothecated as readily and with the same effect as other personal property"; that a mortgage on a ship would be "a most undesirable security" if purchasers of bonds so secured must at their peril ascertain how moneys advanced upon the mortgage are to be spent; and that Congress had constitutional authority to give to a valid mortgage a preferred status, and to provide for the enforcement of the lien in admiralty, by virtue of its control over ships as essentially marine instrumentalities, a control which includes the promotion of their development and the regulation of their use.

Prior to the enactment of the Ship Mortgage Act, 1920, the admiralty had no jurisdiction of a suit to foreclose a mortgage on a ship. *Bogart* v. *The Steamboat John Jay,* 17 How. 399; *Schuchardt* v. *Ship Angelique,* 19 How. 239, 241; *People's Ferry Company* v. *Beers,* 20 How. 393, 400; *The Lottawanna,* 21 Wall. 558, 583; *The Eclipse,* 135 U. S. 599, 608; *The J. E. Rumbell,* 148 U. S. 1, 15.[1] If jurisdiction in the admiralty of the present suits is to be maintained it must be by reason of the application and validity of the provisions of the Ship Mortgage Act.

1. *The application of the statute.* The grant of jurisdiction is found in subsection K (46 U. S. C. 951) which provides:

"A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively".

The grant is thus one of exclusive jurisdiction to enforce the lien of a "preferred mortgage". If the mortgage is a preferred mortgage within the definition of the Act, jurisdiction is granted; otherwise not. "Preferred mortgages" are carefully defined in the detailed provisions of subsection D.[2] 46 U. S. C. 922. The ap-

[1]See, also, the William D. Rice, 3 Ware 134, 136; The Martha Washington, 3 Ware 245, 251; The Sailor Prince, 1 Ben. 461, 466; Morgan *v.* Tapscott, 5 Ben. 252; Britain *v.* The Venture, 21 Fed. 928; The Gordon Campbell, 131 Fed. 963, 965; The Clifton, 143 Fed. 460, 463; The Conveyor, 147 Fed. 586, 589; The Rupert City, 213 Fed. 263, 266.

[2]Subsection D is as follows: "*Preferred Mortgages.* (a) A valid mortgage which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upward, shall in addition have, in respect

plication of this term in the subsequent provisions of the Act, including the provision as to admiralty jurisdiction, is not left to inference but is explicitly stated in subdivision (b) of subsection D as follows:

"Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this chapter called a 'preferred mortgage' as to such vessel".

Subdivision (a) of subsection D provides that a "valid mortgage", which "includes the whole of any vessel of the United States of 200 gross tons and upward," shall have, in addition, "in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the

---

to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of subsection M, section 953, if—

"(1) The mortgage is indorsed upon the vessel's documents in accordance with the provisions of this chapter;

"(2) The mortgage is recorded as provided in subsection C, section 921, together with the time and date when the mortgage is so endorsed;

"(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

"(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

"(5) The mortgagee is a citizen of the United States.

"(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this chapter called a 'preferred mortgage' as to such vessel.

"(c) There shall be indorsed upon the documents of a vessel covered by a preferred mortgage—

"(1) The names of the mortgagor and mortgagee;

"(2) The time and date the indorsement is made;

"(3) The amount and date of maturity of the mortgage; and

"(4) Any amount required to be indorsed by the provisions of subdivision (e) or (f) of this subsection.

"(d) Such indorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of customs of the port of documentation shall give such direction by wire or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document

provisions of subsection M",[3] 46 U. S. C. 953. The term "vessel of the United States" means any vessel documented under the laws of the United States; and, in the case of a mortgage "involving a trust deed and a bond issue thereunder", the term "mortgagee" means the trustee. Subsection B, 46 U. S. C. 911. The "preferred status" given by subsection M is that, on foreclosure and sale in admiralty, all preexisting claims in the vessel are to be held terminated and thereafter are to attach to the proceeds of the

---

is issued for the vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs.

"(e) A mortgage which includes property other than a vessel shall not be held a preferred mortgage unless the mortgage provides for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness. If a preferred mortgage so provides for the separate discharge, the amount of the portion of such payment shall be indorsed upon the documents of the vessel.

"(f) If a preferred mortgage includes more than one vessel and provides for the separate discharge of each vessel by the payment of a portion of the mortgage indebtedness, the amount of such portion of such payment shall be indorsed upon the documents of the vessel. In case such mortgage does not provide for the separate discharge of a vessel and the vessel is to be sold upon the order of a district court of the United States in a suit in rem in admiralty, the court shall determine the portion of the mortgage indebtedness increased by 20 per centum (1) which, in the opinion of the court, the approximate value of the vessel bears to the approximate value of all the vessels covered by the mortgage, and (2) upon the payment of which the vessel shall be discharged from the mortgage".

[3]Subsection M is as follows: "*Preferred Maritime Lien; Priorities; Other Liens.* (a) When used hereinafter in this chapter, the term 'preferred maritime lien' means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

"(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preexisting claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection L, section 952, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court".

sale, and the "preferred mortgage lien" is to have priority over all claims against the vessel, except "preferred maritime liens" and expenses, fees and costs allowed by the Court. "Preferred maritime liens" are those arising prior to the recording and indorsement of the mortgage as required, or "a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage".

The requirements of subdivision (a) of subsection D, which must be met in order to obtain this preferred status, are that the mortgage shall be indorsed upon the vessel's documents and shall be recorded; that an affidavit shall be filed with the record "to the effect that the mortgage is made in good faith and without any design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel"; that the mortgage does not stipulate for a waiver of the preferred status; and that the mortgagee is a citizen of the United States. Subdivisions (c) and (d) of subsection D set forth the nature and manner of the required indorsement upon the documents of the vessel; and subsection C (46 U. S. C. 921), to which subsection D refers, contains detailed provisions as to recording.

Subdivision (e) of subsection D provides that a mortgage which includes property other than a vessel "shall not be held a preferred mortgage" unless there is provision for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness; subdivision (f) of subsection D makes provision for the case of a mortgage covering more than one vessel. And where a mortgage covers property in addition to vessels, the Act is not to be construed as authorizing a proceeding *in rem* in admiralty to enforce the rights of the mortgagee in respect to such property. Subsection N,[4] 46 U. S. C. 954.

Subsection E (46 U. S. C. 923) imposes the duty upon the mortgagor to keep on board the mortgaged vessel a certified copy of the mortgage and to cause it and the vessel's documents to be

[4]Subdivision (b) of subsection N is as follows: "(b) This chapter shall not be construed, in the case of a mortgage covering, in addition to vessels, realty or personalty other than vessels, or both, to authorize the enforcement by suit in rem in admiralty of the rights of the mortgagee in respect to such realty or personalty other than vessels".

exhibited by the master to any person having business with the vessel which may give rise to a maritime lien or to a transfer or mortgage of the vessel. Subsection F (46 U. S. C. 924) requires the mortgagor to disclose to the mortgagee, upon his request, the existence of any maritime lien, prior mortgage, or other obligation or liability of the vessel, that is known to the mortgagor, and prohibits the mortgagor, after the mortgage is executed and before the mortgagee has had reasonable time to record it and to have the necessary indorsements made upon the vessel's documents, from incurring "any contractual obligation creating a lien upon the vessel", other than those liens which are made "preferred maritime liens" as above stated. Provision is also made for the record of notices of claims of lien on the mortgaged vessel, for certificates of discharge of liens, and for the inspection of records and obtaining copies. Subsections G and I, 46 U. S. C. 925, 927. Penalties are provided for failure to exhibit documents and for violation of the Act in other respects; and provision is also made for recovery, by suits in the district courts of the United States, against collectors of customs and mortgagors, or masters of vessels, of damages caused by failure to perform the duties imposed upon them. Subsection J, 46 U. S. C. 941.

An examination of the provisions of the Act leaves no room for doubt that the subject of mortgages of vessels, and, in particular, the priority which should be assigned to them in relation to other liens, was under the close scrutiny of the Congress in determining its policy. But, among all the minute requirements of the Act, we find none as to the application of the proceeds of loans which such mortgages secure. No condition is imposed as to the purposes for which the moneys are lent. While the Congress took care to make distinct provision for cases where a mortgage covers property other than a vessel, no distinction is made as to the status of mortgages of vessels by reason of an intention to devote the borrowed moneys to uses other than maritime. We are not at liberty to imply a condition which is opposed to the explicit terms of the statute. It is enough, so the statute says expressly, that the mortgage is upon a vessel of the United States, that it is a valid mortgage, that it is made in good faith, that it is disclosed by proper indorsements on the vessel's documents and is duly recorded, and that the other conditions, specified in detail, are met. Such a

mortgage upon a vessel documented under the laws of the United States, the Congress has undertaken to regulate with respect to priority of lien. If the conditions so laid down are fulfilled, the mortgage is to be a "preferred mortgage" with all the incidents which the Act attaches to it, including the right to bring foreclosure in admiralty. To hold that a mortgage is not within the Act which the Act itself states is within it, is not to construe the Act but to amend it. The question of policy—whether different terms should have been imposed—is not for us. We may not add to the conditions set up by Congress any more than we can subtract from them. They stand, as defined, precise and complete.

We see nothing in the general purpose of the Act which can be deemed to restrict the natural meaning and effect of its language. Rather, the general purpose emphasizes that meaning and effect. The Ship Mortgage Act is a part of the Merchant Marine Act, 1920. 41 Stat. 988. Its declared purpose is "to provide for the promotion and maintenance of the American merchant marine". The Congress, in its wisdom, decided upon the means to achieve that object and set forth its conclusions in the terms of the statute. The legislative history of the statute shows the controlling considerations. The report of the Senate Committee on Commerce pointed out that "mortgage security on ships" was "practically worthless"; that it was proposed to "make it good except as to certain demands that should be superior to everything else, such as wages"; and that it was desired to have "our people and capital interested in shipping and shipping securities". Sen. Rep. No. 573, 66th Cong., 2d sess., p. 9. The bill, with this purpose, was developed in conference. The managers on the part of the House of Representatives, in their statement accompanying the report of the Committee of Conference, observed that by the enlarged provisions of the bill "the mortgagee under a mortgage upon a vessel of the United States is made more secure in his interest in the vessel than he is under existing admiralty law", and, referring to the plan of "creating a preferred mortgage", added that "the preferred status arises upon the recording of the mortgage as a preferred mortgage and its indorsement upon vessel's documents". There is no suggestion of any requirement as to the use, intended or actual, of the moneys borrowed upon the faith of the mortgage security. H. R. No. 1102, 66th Cong., 2d sess., p. 34; H. R. No. 1107, 66th

Cong., 2d sess., p. 31.[5] The measure was enacted in the terms thus proposed.

In placing ship mortgages upon a stronger basis as securities, the Congress had in mind, and expressly included, trust deeds securing issues of bonds to the public. Subsection B, 46 U. S. C. 911. It is plain that the fundamental purpose to promote public confidence in such securities, and their extended use as investments, would have been frustrated if purchasers of bonds had to discover at their peril the application of the proceeds of the secured loans, or if their rights depended upon such knowledge as their trustee might have, rather than upon the satisfaction of the statutory conditions and the disclosures, as required, by indorsement on the vessel's documents and recording. But, while con-

[5]In this statement, the House managers said: "This Senate amendment is an extensive provision by which the mortgagee under a mortgage upon a vessel of the United States is made more secure in his interest in the vessel than he is under existing admiralty law. The amendment supplements the existing mortgage recording provisions by creating a preferred mortgage which in foreclosure proceedings will have priority in the distribution of the proceeds from the sale of the mortgaged vessel over all maritime liens against the vessel except liens for damages arising out of tort, stevedores' and crews' wages, general average, and salvage. The preferred status arises upon the recording of the mortgage as a preferred mortgage and its indorsement upon vessel's documents. Under the Senate amendment the foreclosure proceedings are brought in the Federal courts in equity with simulated admiralty procedure under which the court in equity gives a title good against the world, and terminates all preexisting claims against the vessel. . . .

"The House recedes with an amendment which places the constitutional basis of Congress's power to legislate in respect to vessel mortgages, upon the grant of admiralty jurisdiction and the 'necessary and proper clause' of the Constitution, instead of the power to regulate interstate and foreign commerce. The amendment as agreed to further places exclusive jurisdiction in the Federal courts to foreclose vessel mortgages upon the grant of admiralty jurisdiction instead of the provisions of the Constitution relating to diversity of citizenship and cases arising under the laws of the United States. The amendment as agreed to also makes the title granted under the order of a court of admiralty in the case of the libel of a vessel covered by a preferred mortgage good against the world as under the existing admiralty law and international admiralty practice; clarifies the provisions as to fleet mortgages; provides for the reenactment and incorporation in the amendment of the existing vessel mortgage recording provisions, and prevents the repeal of section 4 of the maritime lien act of 1910 in respect to the doctrines of advances and laches".

templating such bond issues, with their obvious practical incidents, the Congress did not set up a special rule for them, or for purchasers of bonds without notice as to the application of proceeds. The Congress made simple, clear and definite conditions as to all ship mortgages otherwise valid, and when these were performed the mortgages were to have the status prescribed.

Given the standing of such mortgages in admiralty, which the Congress desired to establish, an omission of a provision as to the use of the moneys borrowed cannot be regarded as anomalous. An analogous principle has been recognized in relation to bottomry and respondentia bonds. Thus, in the case of bottomry bonds, if the conditions of the bottomry attach, such bonds when given by the owner of the vessel have been held to be within the admiralty jurisdiction even if they are given to secure non-maritime outlays. That view was emphatically stated by Justice Story in *The Draco,* 2 Sumn. 157. There, jurisdiction of the District Court, sitting in admiralty, was challenged upon the ground that the bond in question was not a "fit foundation for a proceeding *in rem.*" *Id.,* p. 174. After a careful review of the historical conception of bottomry bonds, Justice Story concluded (*id.,* p. 186): "In my opinion, there is not the slightest ground to uphold the doctrine, that, in order to constitute a bottomry bond, as such, in the sense of the maritime law, it is necessary, that the money should be advanced for the necessities of the ship, or for the cargo, or for the voyage. Where it is given by the master, *virtute officii,* it must, in order to have validity, be for the ship's necessities; for the implied authority of the master extends no farther. But where it is given by the owner, as *dominus navis,* he may employ the money, as he pleases. It is sufficient, if the money be lent upon the bottom of the ship, at the risk of the lender, for the voyage". So, in the case of a respondentia loan, it is not necessary that it should be made before the departure of the ship on the voyage or that the money lent should be employed in the outfit of the vessel or invested in the goods on which the risk is run. It matters not, this Court has said, at what time the loan in made, or upon what goods the risk is taken. "If the risk of the voyage be substantially and really taken", and the transaction be otherwise valid, "it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage". The lender is not presumed to lend

"upon the faith of any particular appropriation of the money". *Conard* v. *Atlantic Insurance Company,* 1 Pet. 386, 437. See *Conard* v. *Nicoll,* 4 Pet. 291, 310; 3 Kent's Com., 361; note (e); *The Draco, supra,* pp. 188, 189.

It is also to be noted that the jurisdiction granted to the admiralty by the Ship Mortgage Act is exclusive. If a mortgage is within the Act, there can be no suit to foreclose it in a state court;[6] if the mortgage is not within the Act, there can be no suit for foreclosure in the admiralty. It cannot be doubted that the Congress recognized the importance of basing the jurisdiction, as thus sought to be conferred, upon precise statutory conditions. We find no warrant for leaving it to be tested by extrinsic criteria, raising a host of questions as to the application of the proceeds of loans, in the solution of which the statute affords no aid.

We conclude that the Court had jurisdiction of the suits provided the Congress had authority to grant it.

2. *The validity of the grant of jurisdiction.* The Congress rested its authority upon the constitutional provisions extending the judicial power "to all cases of admiralty and maritime jurisdiction" and conferring upon the Congress the power to make all laws which shall be "necessary and proper" for carrying into execution all powers "vested by this Constitution in the government of the United States, or in any department or officer thereof". Art. III, sec. 2; Art. I, sec. 8, par. 18.[7] This authority was not confined to the cases of admiralty and maritime jurisdiction in England when the Constitution was adopted. *Waring* v. *Clarke,* 5 How. 441, 457, 458. The limitations which had been imposed upon the high court of admiralty in the course of its controversy with the courts of common law were not read into the grant. But the grant presupposed a "general system of maritime law" which was familiar to the lawyers and statesmen of the country, and contemplated a body of law with uniform operation. *The Lottawanna,* 21 Wall. 558, 574, 575. The Constitution did not undertake to define the precise limits of that body of law or to lay down a criterion for drawing the boundary between maritime law and local law. *Id.* Boundaries were to be determined in the exercise of the judicial power in recognition of the purpose of the grant.

[6]See Note 5.

[7]See Note 5.

"No state law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits". *The St. Lawrence,* 1 Black., 523, 527. The framers of the Constitution did not contemplate that the maritime law should remain unalterable. The purpose was to place the entire subject, including its substantive as well as its procedural features, under national control. From the beginning the grant was regarded as implicitly investing legislative power for that purpose in the United States. When the Constitution was adopted, the existing maritime law became the law of the United States "subject to power in Congress to modify or supplement it as experience or changing conditions might require". *Panama Railroad Company* v. *Johnson,* 264 U. S. 375, 385-387. The Congress thus has paramount power to determine the maritime law which shall prevail throughout the country. *The Lottawanna, supra,* p. 577; *Butler* v. *Boston Steamship Co.,* 130 U. S. 527, 557; *In re Garnett,* 141 U. S. 1, 13; *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 215; *Crowell* v. *Benson,* 285 U. S. 22, 39; *United States* v. *Flores,* 289 U. S. 137, 148, 149. But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction. *The Belfast,* 7 Wall. 624, 641; *Panama Railroad Company* v. *Johnson, supra; Crowell* v. *Benson, supra,* p. 55.

The Congress began the exertion of this authority at an early date. In the Judiciary Act of 1789, the Congress conferred upon the district courts of the United States exclusive jurisdiction of all seizures under the laws of impost, navigation, or trade of the United States, where the seizures were made on navigable waters within the respective districts. Sec. 9, 1 Stat. 76, 77. *Waring* v. *Clarke, supra,* p. 458; *The Margaret,* 9 Wheat. 421, 427. By the Act of June 19, 1813, 3 Stat. 2, the Congress declared that a vessel employed in a fishing voyage should be answerable for the fishermen's share of the fish caught, upon a contract made on land, in the same form and to the same effect as any other vessel is liable to be proceeded against for the wages of seamen. *Waring* v. *Clarke, supra.* Important illustrations of the exercise of congressional power are found in the Limitation of Liability Act of 1851, 9 Stat. 635, enacted for the purpose of encouraging investment in shipbuilding, by limiting the venture of shipowners to the loss of the ship itself, or her freight then pending, in cases of damage occa-

sioned without the owner's privity or knowledge (*Norwich Company* v. *Wright,* 13 Wall. 104; *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207, 214); the extension, by the Act of June 26, 1884, Sec. 18, 23 Stat. 57, 58, of the admiralty jurisdiction to proceedings for the limitation of liability, so as to include damages by a vessel to a land structure (*The Plymouth,* 3 Wall. 20; *Cleveland Terminal R. R. Co.* v. *Steamship Co.,* 208 U. S. 316; *Richardson* v. *Harmon,* 222 U. S. 96, 101, 106); the Act of 1910, 36 Stat. 604, providing for a maritime lien for repairs or supplies furnished to a vessel in her home port, to be enforced by a proceeding *in rem* (*The General Smith,* 4 Wheat. 438, 443; *The St. Jago de Cuba,* 9 Wheat. 409, 420; *The J. E. Rumbell,* 148 U. S. 1, 12; *Piedmont Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1, 11); the Act of March 30, 1920, 41 Stat. 537, providing for jurisdiction in admiralty of suits for damages from death caused by wrongful act and occurring on the high seas (*The Hamilton,* 207 U. S. 398; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 243; *Lindgren* v. *United States,* 281 U. S. 38, 48); the Seamen's Act of 1915, Sec. 20, 38 Stat. 1185 (*Chelentis* v. *Luckenbach Steamship Co.,* 247 U. S. 372, 384); the Merchant Marine Act of 1920, 41 Stat. 1007, amending Section 20 of the Act of 1915, thus bringing, in relation to seamen, into the maritime law, rules drawn from the Federal Employers' Liability Act (*Panama Railroad Company* v. *Johnson, supra; Engel* v. *Davenport,* 271 U. S. 33, 35; *Panama Railroad Company* v. *Vasquez,* 271 U. S. 557, 559; *Northern Coal Co.* v. *Strand,* 278 U. S. 142, 147); and the Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424 (*Nogueira* v. *N. Y., N. H. & H. R. R. Co.,* 281 U. S. 128; *Crowell* v. *Benson, supra*).

Of special significance, in relation to the present question, are the Acts of 1884 and 1910, *supra.* By the former, the admiralty jurisdiction in limitation proceedings was enlarged so as to embrace the liability for a non-maritime tort. Although the damaged structure was on land, the injury was due to the operation of the vessel, and it could not be said that the Congress had stepped beyond the limits of its authority to amend the law in furthering its policy to encourage investments in ships. *Richardson* v. *Harmon, supra.* Compare *The Blackheath,* 195 U. S. 361, 367, 368. The Act of 1910 created a lien to be enforced *in rem* for repairs or

supplies to vessels in their home ports. The state of the law as it existed before that enactment was fully described in *The J. E. Rumbell, supra.* For repairs or supplies furnished to a vessel in a foreign port, a lien was given by the general maritime law and could be enforced in admiralty, but for repairs or supplies in the home port, no lien existed, or could be enforced in admiralty under the general law, independently of local statute. When the statute of a State gave a lien to be enforced by process *in rem* against the vessel for repairs or supplies in her home port, that lien, being similar to the lien arising in a foreign port under the general law, was deemed to be in the nature of a maritime lien and therefore could be enforced in admiralty, and, in such case the enforcement of the lien was within the exclusive jurisdiction of the courts of the United States sitting in admiralty. The result was that where necessaries were furnished to a vessel in her home port, the vessel could not be sued in the federal courts under the general maritime law, for that law was not deemed to confer a lien, and could not be sued in a state court for that court could not enforce the lien created by the state law, but the lien so given might be enforced in admiralty.[8] The Act of 1910 abolished the artificial distinction between repairs and supplies in a home port and those in a foreign port. While it created a lien where, in the absence of local provision therefor, none had theretofore existed, the change was not deemed to be inconsistent with the general principles of the maritime law and it effected a substitution of a single federal statute for the conflicting state statutes. *Piedmont Coal Co.* v. *Seaboard Fisheries Co., supra.* The Act of 1910 also provided that it should not be necessary "to allege or prove" that credit was given to the vessel; previously, supplies furnished to the vessel at the home port, or on the owner's order, were presumed to be furnished upon his personal credit and created no lien. *Id.*

Respondent, in attacking the grant of jurisdiction by the Ship Mortgage Act, relies strongly upon the reasoning of the Court in *Bogart* v. *The Steamboat John Jay, supra,* which denied, under the former law, jurisdiction in admiralty to enforce payment of a mortgage upon a vessel. The Court there said that neither in England[9] nor in the United States had the admiralty courts exer-

[8]See Benedict's Admiralty, 5th ed., secs. 87, 88.

[9]See *The Neptune,* 3 Hagg. 129 (132).

cised jurisdiction in questions of property between a mortgagee and the owner; that the foundation of the rule was "that the mere mortgage of a ship, other than that of an hypothecated bottomry", was a contract "without any of the characteristics or attendants of a maritime loan" and was made "without reference to navigation or perils of the sea"; that it was a security "to make the performance of the mortgagor's undertaking more certain"; that, while the mortgagor continued in possession of the ship, the mortgagee was disconnected "from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account"; that there was nothing maritime in the contract; and that from the organization of courts of admiralty and their modes of proceeding they cannot secure to the parties to the mortgage "the remedies and protection which they have in a court of chancery".

But it did not follow, because this view was taken of the existing law, that the Congress was without power to amend the law so as to enable the admiralty courts to take cognizance of mortgages on ships, and to regulate priorities of liens, in order to promote investment in shipping securities and thus to advance the maritime interests of the United States. Indeed, in the *Bogart* case the Court seemed to recognize the existence of that constitutional authority. For the Court, in concluding its opinion, observed that the policy of commerce and its exigencies in England had given to its admiralty courts a more ample jurisdiction in respect to mortgages of ships than they had under the former rule. And the Court pointed out that this "enlarged cognizance of mortgages" had been given by statute 3 and 4 Victoria, chap. 65, and said that "until this shall be done in the United States by congress, the rule, in this particular, must continue in the admiralty courts of the United States as it has been".

The significance of this suggestion cannot be overlooked. The fact that mortgages on ships had not been considered to be maritime contracts was not conclusive as to the constitutional authority of the Congress to alter or supplement the maritime law in this respect, and thus to extend the admiralty jurisdiction, "as experience or changing conditions might require", while keeping within a proper conception of maritime concerns. The ship, docu-

mented under the laws of the United States, is the instrumentality of our maritime enterprise, the prime object of our maritime policy. The ship "from the moment her keel touches the water" becomes "a subject of admiralty jurisdiction"; she acquires personality; she becomes competent to contract, is individually liable for her obligations, and is responsible for her torts. *Tucker* v. *Alexandroff*, 183 U. S. 426, 438. The existence of the ship, the investments which make that existence possible, is the necessary postulate of maritime liens. We cannot fail to regard the encouragement of investments "in shipping and shipping securities"—the objective of the Ship Mortgage Act—as an essential prerogative of the Congress in the exercise of its wide discretion as to the appropriate development of the maritime law of the country. The regulation of the priorities of ship mortgages in relation to other liens, and the conferring of jurisdiction in admiralty in order to enforce this regulation, are appropriate means to that legitimate end.

The enlargement of the cognizance of mortgages of ships, in the admiralty courts in England, nearly one hundred years ago, to which the Court referred in the *Bogart* case, was to remedy an evil which had been found to exist. The purpose was "to enable the Court to exercise its ordinary jurisdiction to the full extent".[10] That Act applied whenever the ship was "under arrest by process issuing from the high court of admiralty" or the proceeds of a ship so arrested had been brought into the registry of the court, and the court was invested with "full jurisdiction to take cognizance of all claims and causes of action of any person in respect to any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively." 3 & 4 Vict., c. 65, secs. 3, 4. These provisions were expanded by later legislation. The admiralty court in England has jurisdiction in respect of any mortgage duly registered according to the provisions of the Merchant Marine Act, 1894, "whether or not the ship or proceeds are under the arrest of the Court, and such jurisdiction may be exercised by an action *in rem* or *in personam*". Roscoe's Admiralty Practice, 5th ed., p. 51.

This response "to the exigencies of commerce" has had its counterpart in the legislation of other European States. It may

[10]See statement of Dr. Lushington in *The Fortitude*, 2 Wm. Rob. 217, 222.

be said that the "general maritime law" takes cognizance of mortgages of ships, provides for their registration, and establishes rules with respect to priorities.[11]

Prior to the Ship Mortgage Act the right of the mortgagee to intervene as a claimant of proceeds of a vessel sold by process in the admiralty was recognized and was frequently exercised. *Schuchardt* v. *Ship Angelique, supra; The Lottawanna, supra; The J. E. Rumbell, supra.* The distinction between such an intervention and an original proceeding by the mortgagee was no doubt controlling as a matter of jurisdiction and procedure under the law as it then existed, but it cannot be considered as establishing a criterion of the constitutional power of the Congress in defining jurisdiction and procedure. The Congress undoubtedly could determine the priorities that should be recognized by the admiralty court and, having that authority, the Congress could fix the conditions upon which mortgages of ships documented under the laws of the United States should have the priority specified. The grant of jurisdiction in admiralty to entertain a suit by the mortgagee, where the mortgage complies with the prescribed conditions, in order to enforce the permitted lien against the vessel, is, after all, but a provision of suitable machinery to give effect to the rights which the Congress has created.

If it be concluded, and we think it must be, that the Congress has this power in the case of the mortgage of a vessel to provide for its acquisition, or for the discharge of preexisting liens, or for its necessities, that is, to authorize the enforcement by suits in admiralty of mortgages given to secure loans for the direct benefit of the vessel, we perceive no ground to deny to the Congress constitutional power to make similar provision as to mortgages of ships, which comply with its rules, although the proceeds of the

[11]See, e. g., The Netherlands, Maritime Law, Code of Commerce, 1838; France, Act of July 10, 1885, and Decree of June 18, 1886; Belgium, Laws of August 21, 1879, June 12, 1902, February 10, 1908, and September 4, 1908; Denmark, Maritime Law of April 1, 1892, Act 103 of April 29, 1913, also Act 57 of April 1, 1892; Italy, Maritime Law, Code of Commerce of 1883, and Mercantile Marine Code, 1866, as amended; Norway, Maritime Law of July 20, 1893, as amended by Acts of May 4, 1901, July 13, 1917, and July 9, 1920. See, Constant, "The Law Relating to the Mortgage of Ships", Appendix A; "The Progress of Continental Law in the 19th Century," Georges Ripert, Maritime Law, Continental Legal History Series, p. 399.

loans thereby secured are used for other purposes. The analogy of the decision by Justice Story in *The Draco* case, *supra,* as to bottomry bonds, and of the decision of this Court in the *Conard* case, *supra,* as to respondentia bonds, is apparent. If the maritime law does not require, as Justice Story held, that a bottomry bond, as such, must be given for the necessities of the ship or for the cargo or for the voyage, but that it is sufficient, when given by the owner, that the money be lent upon the bottom of the ship, at the risk of the lender, for the voyage, and that in such case the owner is free to employ the money as he pleases; if, as this Court decided, in the case of a respondentia loan, it is no objection that it is made after the departure of the ship, or that the money lent was not employed in the outfit of the vessel, or invested in the goods on which the risk was run, or that the money was appropriated for purposes wholly unconnected with the voyage, we cannot see that an analogous provision with respect to ship mortgages is so far inconsistent with the fundamental principles of maritime law as to place such mortgages beyond the authority of the Congress in determining the admiralty jurisdiction. The contention to the contrary loses sight of the dominant purpose of the Act, a purpose which the Congress was competent to achieve. That purpose, we repeat, was to establish the worth of "shipping securities", in the interest of the merchant marine. In order to create public confidence in such securities, in obligations issued on the faith of ship mortgages, the Congress deemed it necessary, not to hamper their issue or enforcement by compelling inquiries as to the application of loans, but to give a definite and assured character to such mortgages provided they met certain simple conditions. The Congress in the exercise of its discretion was entitled to consider the methods by which securities are issued to the public and dealt in, and the well-known usages of business in this regard amply support its judgment.

The authority of the Congress to enact legislation of this nature was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was

limited to tidewaters. *The Genesee Chief,* 12 How. 443, overruling *The Thomas Jefferson,* 10 Wheat. 428.

The constitutional validity of the grant of jurisdiction by the Ship Mortgage Act has been sustained in *The Oconee,* 280 Fed. 927, in *The Nanking,* 290 Fed. 642, and in *The Lincoln Land,* 295 Fed. 358.[12] We find no reason for reaching a contrary conclusion in the instant cases.

The decrees of the Circuit Court of Appeals are reversed and the causes are remanded for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[12]The validity of the Act was not questioned in Morse Dry Dock & Repair Co. *v.* Northern Star, 271 U. S. 552, 555, 556, and its validity has been assumed in several decisions in the lower federal courts. See The Egeria (C. C. A. 9th), 294 Fed. 791; The Northern No. 41 (S. D. Fla.), 297 Fed. 343; The Red Lion (E. D. N. Y.), 22 F. (2d) 329; National Bank *v.* Enterprise Marine Dock Co. (C. C. A. 4th), 43 F. (2d) 547; Consumers Co. *v.* Goodrich Transit Co. (C. C. A. 7th), 53 F. (2d) 972.